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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-.....

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The landowner-defendants below, on behalf of themselves and all other individuals whose farms in the Imperial Valley of California exceed 160 acres, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.[1]

OPINIONS BELOW

The principal opinion of the District Court appears at 322 F.Supp. 11 (S.D.Cal. 1971). The principal opinion of

1. The individual landowner-defendants are John M. Bryant, Robert C. Brown, Harold Brockman, Stephen Elmore, Clara Maria Gutierrez, John Kubler and Charles Nilson. Respondents are Ben Yellen and 122 other individuals (hereinafter "respondents"). The State of California and the Imperial Irrigation District are non-adverse respondents designated pursuant to Rule 21(b)(4) of this Court's Rules. The United States was plaintiff in the District Court, but elected not to appeal from the District Court's judgment, and is therefore not a party to the proceedings in this Court.

the Court of Appeals, reversing the District Court, appears at 559 F.2d 509 (1977). The order of the District Court denying respondents leave to intervene for purposes of appeal is unreported. The order of the Court of Appeals allowing intervention by respondents was not published, but appears as an Appendix to the Court of Appeals' decision on the merits, 559 F.2d at 543. The opinion of the Court of Appeals on petition for rehearing appears at 595 F.2d 525 (1979). The opinion of the Superior Court of the State of California in *Hewes v. All Persons* (No. 15460, Superior Court, Imperial County, 1933) is unreported. Copies of all these opinions and orders are in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 18, 1977. A timely petition for rehearing was filed on September 15, 1977 and was denied on April 23, 1979. On July 18, 1979, Mr. Justice Stevens extended until September 14, 1979, petitioners' time to file a petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals' denial of full faith and credit to the *in rem* judgment of the California court in *Hewes v. All Persons* violates basic principles of federalism articulated in *California v. United States,* 438 U.S. 645 (1978), by nullifying state law procedures designed to achieve final and binding determination of irrigation district obligations and water rights?

2. Whether denial of irrigation water to the 233,000 acres of Imperial Valley farmland in ownerships exceeding 160 acres will negate this Court's decrees in *Arizona v. California,* 373 U.S. 546 (1963), 376 U.S. 340 (1964), 439 U.S. 419 (1979), by denying beneficial use of water to the very lands for which the District's present perfected rights in Colorado River water were recognized by the Boulder Canyon Project Act and this Court?

3. Whether the Court of Appeals violated the standard prescribed by this Court for judicial review of longstanding administrative constructions when it accorded no weight to an administrative interpretation of almost 50 years' standing, and held, contrary thereto, that the Boulder Canyon Project Act of 1928 requires denial of irrigation water to all farmlands in the Imperial Valley of California which exceed 160 acres in single ownership?

4. Whether the Court of Appeals violated the requirements of Article III by entering a judgment that will radically alter the economy and social structure of an entire region of the United States at the behest of parties who, by the same court's own opinion, were shown not to have standing under repeated decisions of this Court?

STATUTORY PROVISIONS INVOLVED

Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617 *et seq.*

Reclamation Act of 1902, §§ 1, 3-5, 8, 10, 32 Stat. 388, 43 U.S.C. §§ 372, 373, 383, 391, 416, 419, 431, 432, 434, 439.

Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 43 U.S.C. § 423e.

Reclamation Extension Act of 1914, 38 Stat. 686, 43 U.S.C. § 418.

Colorado River Compact, 70 Cong.Rec. 324 (1928).

California Irrigation District Act of 1897, § 68, 1897 Cal. Stat. 254, 276.

California Irrigation District Act of 1917, § 3, 1917 Cal. Stat. 243, 245.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

This case poses fundamental issues regarding the duty of federal courts to respect state law arrangements governing vital water rights and to accord full faith and credit to state court judgments, the meaning of this Court's decision and decrees in *Arizona v. California,* 373 U.S. 546 (1963), 376 U.S. 340 (1964), 439 U.S. 419 (1979), and the limits of judicial power to overturn longstanding administrative constructions of important federal statutes. The issues have far-reaching impact in terms of federal jurisprudence and are of critical importance to the water laws of the Western States.

At issue is whether the Boulder Canyon Project Act of 1928 incorporates provisions of federal reclamation law which would impose limitations on the maximum acreage of farms irrigated with Colorado River water. The Project Act authorized construction of Hoover Dam and, in addition, authorized construction of a canal on American soil to deliver water from the Colorado River to farms in the Imperial Valley of California. Those farms were irrigated with Colorado River water from 1901 through 1942 using a privately-constructed canal that ran partly through Mexico. Shortly after passage of the Project Act, a question arose as to whether provisions in general reclamation law limiting farms to 160 acres were made applicable by the Project Act to farms in the Imperial Valley. The Secretary of the Interior ruled in 1933 that the Project Act does not subject Imperial Valley farms to acreage limitation and, in an *in rem* proceeding which the federal government caused to be instituted in 1933, a decree was entered by the California courts confirming that acreage limitations are not made applicable to privately owned farmlands in the Imperial Valley. *Hewes v. All Persons,* App. 105a. This interpretation of the law prevailed for decades, and generations of farmers acquired lands and devoted their lives to developing those lands in reliance on that settled construction of federal law.

The District Court, after a full trial, upheld the longstanding construction of the Project Act. In the decision below, a panel of the Ninth Circuit overturned the District

Court and the longstanding construction, and decreed that the Act requires denial of Colorado River water to the majority of farmlands in the Imperial Valley in their current ownerships. In so doing, the Ninth Circuit brushed aside the judgment of the California courts in *Hewes,* which under California law bars respondents and all other persons from relitigating the issues decided in 1933, and thereby undermined a critical component of the statutory scheme established by California and the other Western States for securing early binding determinations fixing water rights and defining irrigation district obligations. Likewise, the Court of Appeals undermined this Court's decision and decrees in *Arizona v. California, supra.* And, in its eagerness to decide the merits of this controversy, the Court of Appeals strained to grant standing to post-judgment intervenors who have sustained no particularized injury and who will not benefit from the court's abrupt reversal of the settled interpretation of the Act.

Results such as these and the principles at stake merit the attention of this Court.

Proceedings Below, Parties, and Jurisdictional Matters. This action was brought by the United States against Imperial Irrigation District on January 11, 1967. The complaint alleged a new construction of the Boulder Canyon Project Act by a Solicitor of the Department of the Interior, after 40 years of contrary interpretation, and sought a declaration pursuant to that reinterpretation that the District "is bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to all privately owned lands." I CR 9.[1] The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1345. Petitioners were permitted to intervene as defendants both individually and as representatives of all persons whose farms in the District exceed 160 acres in single ownership. I CR 12. The State of California was allowed to intervene as a defendant. II CR 1.

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1. References to "CR" indicate the Clerk's Record in the Court of Appeals. References to "LX-" indicate exhibits introduced by petitioners in the District Court.

On January 5, 1971, the District Court rendered a decision holding that "the land limitation provisions of reclamation law have no application to privately owned lands lying within Imperial Irrigation District." 322 F. Supp. at 27; App. 72a. Judgment was entered for defendants on February 9, 1971. I CR 125.

Prior to expiration of the time for appeal, the Department of the Interior recommended against an appeal and the Department of Justice concurred in that decision. Solicitor General Griswold explained that he had "considered the matter carefully and thoroughly . . . over a considerable period of time" and had "become convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it." 117 *Cong. Rec.* S 21299.

On March 18, 1971, respondents moved to intervene to prosecute an appeal. II CR 47. Respondents alleged as their sole interest in this case a desire to purchase farmland in the Imperial Valley. II CR 53-54. They alleged only that they were unable to purchase land at prevailing market prices. They did *not* allege, then or subsequently, what price they could afford to pay or whether imposition of acreage limitations would result in farmland prices they could afford to pay. Their motion to intervene was denied on March 29, 1971. App. 101a. On April 5, 1971, they noticed an appeal from the order denying intervention, and filed a "protective" notice of appeal from the decision on the merits. I CR 205.

On August 6, 1973, a panel of the Ninth Circuit issued an order permitting respondents' intervention to prosecute an appeal, not on the basis of Rule 24, but on grounds of judicial administration. App. 56a-57a. The Court of Appeals rendered its principal decision on August 18, 1977. First, the Court ruled that respondents had standing to litigate an appeal in this case. Then, the Court reversed the judgment of the District Court on the merits. Timely petitions for rehearing were filed by petitioners, the District and the State of California, but were eventually denied by the Ninth Circuit panel on April 23, 1979.

Early Settlement and Development of Imperial Valley. The Imperial Valley occupies the Southeast corner of California near its border with Mexico and Arizona. A desolate, uninhabitable desert in its natural state, the Valley lies below sea level, 50 miles west of the Colorado River. In the second half of the nineteenth century, a group of Californians conceived the plan of diverting water from the mainstream of the Colorado River and transporting it by gravity flow to the Imperial Valley.[1] In the 1890's they initiated appropriations of the water of the river in accordance with state[2] and federal[3] law, and in early 1900 they commenced digging a diversion canal, partly in Mexico and partly in the United States. For much of its length the canal followed the channel of a stream in Mexico called the Alamo River; hence the canal became known as the "Alamo Canal." The Alamo Canal was completed and water diversions commenced in July 1901. The flow of water to the desert sparked unprecedented settlement, and by 1920, there were 43,453 residents in the Valley and 414,720 acres were under irrigation.

The General Reclamation Laws. On June 17, 1902, Congress passed the National Reclamation Act with the hope that other areas in the West would be able, with federal assistance, to achieve what was then being accomplished with private resources in Imperial Valley. 32 Stat. 388 *et seq.* The Act set aside the proceeds from future sales of public lands in the 16 Western states and territories to finance "the construction and maintenance of irrigation works . . . for the reclamation of arid and semi-arid lands in the said States and Territories." 43 U.S.C. § 391.

During the years when Imperial Valley was being developed with outstanding success, government projects financed under the 1902 Reclamation Act were approaching the brink of financial failure. One problem was that much of the arid land in project areas was held in large tracts for speculative investment. Although § 5 of the 1902 Act

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1. This early history of Imperial Valley's development is recounted in this Court's opinion in *Arizona v. California*, 373 U.S. 546, 552-553 (1963). See generally Moeller, *Phil Swing and Boulder Dam* (1971).

2. Cal. Civ. Code § 1415 (1872).

3. *Rev. Stat.* 2239, 43 U.S.C. § 661.

prohibited the sale of water rights by the government to privately-owned lands in excess of 160-acre ownerships, this did not prevent the owners of undeveloped large tracts from holding them and selling them in 160-acre parcels to settlers at high prices reflecting the value of water which would be made available to the settlers through government facilities. As a result, settlers spent all of their capital making down payments for land, incurred huge mortgage obligations, and were unable to finance the costs of changing their raw land into productive farmland. Settlement and irrigation development proceeded slowly, and most settlers were unable to meet their repayment obligations for the water rights they had purchased from the government.

These problems led to amendments to the 1902 Act designed to put the reclamation program on a sound financial footing, to remove barriers to settlement and to encourage conversion of dry lands into irrigated farms. Section 46 of the Omnibus Adjustment Act of 1926 supplemented the 160-acre limitation contained in § 5 of the 1902 Act by prohibiting the sale of dry land to settlers at inflated prices and by securing the breakup of large undeveloped tracts into 160-acre parcels available for purchase by settlers at prices approved by the Secretary.

The Boulder Canyon Project Act. The problems plaguing the federal reclamation program were not present in Imperial Valley, where full settlement and development had already been achieved. An entirely different set of problems had arisen in the Valley, and these led to the Boulder Canyon Project Act.

In 1905, the Colorado River had breached its channel and, passing through the irrigation canal previously built, had flooded Imperial Valley. This breach was finally closed in 1907, but the 50,000 settlers in the Valley faced the ever-present threat of a recurrence. Other problems arose from the fact that operation of the Alamo Canal was exposed to difficulties whenever domestic conditions in Mexico became unsettled. These difficulties generated hopes within this country that someday there would be a canal wholly within the United States — an all-American canal. In 1919, the Department of the Interior issued a report

recommending construction of an all-American canal to the Imperial Valley, and also of a large storage reservoir in the mainstream of the Colorado to control the erratic and often destructive flow of the river. Congress directed investigation of such a project, 41 Stat. 600 (1920), and pursuant thereto the Department issued a Report in 1922, recommending that the federal government construct not only an all-American canal but also a dam and reservoir at Boulder Canyon. S. Doc. No. 142, 67th Cong., 2d Sess. (1922).

Given the prospect of a national project on the Colorado River, the seven states located in the river's basin sought and were granted congressional consent to negotiate and enter into a compact for the "equitable division and apportionment . . . of the water supply of the Colorado River." 42 Stat. 171 (1921). After a year of negotiations, the seven states reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact, divided the entire basin into two parts, the Upper Basin and the Lower Basin, and apportioned to each basin 7,500,000 acre feet of water a year from the Colorado River System. 70 *Cong. Rec.* 324 (1928).

During the last negotiating sessions in Santa Fe, representatives of the Imperial Valley pressed for inclusion in the Compact of language specifically protecting their appropriative rights to the quantities of water they had been diverting from the River since 1901. As a result, and with the Imperial Valley in mind,[1] Article VIII of the Compact was drafted, recognizing "present perfected rights" to water from the river and requiring that such rights "be satisfied" from any storage facility constructed on the river.

Between 1922 and 1928, Congressman Phil Swing, representative from the Imperial Valley, and Senator Hiram Johnson of California made attempts in each session to secure enactment of legislation authorizing construction of a dam on the Colorado and an all-American canal. The last of the Swing-Johnson bills was enacted as the Boulder

1. *Hearings Pursuant to S.Res. 320,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess. 678 (1925), LX-DD(C).

Canyon Project Act in December 1928. 45 Stat. 1057. Section 6 of the Act explicitly directed the "satisfaction of present perfected rights in pursuance of Article VIII of . . . [the] Colorado River Compact. . . ." 43 U.S.C. § 617e.

At the time the Project Act took effect on June 25, 1929, irrigation development and settlement in the Imperial Valley had been virtually completed. The District then operated a fully developed distribution system consisting of 1,700 miles of main and lateral canals, as compared with approximately 1,650 miles of canals operated today. II CR 15. Its farmers were irrigating approximately 424,000 acres, some 13,000 less than today, II CR 23-24, and the population of the Valley was 61,000.

The All-American Canal Contract. Following passage of the Project Act, the Secretary of the Interior commenced negotiations with the Imperial Irrigation District for a contract, as required by § 5 of the Project Act, obligating the District to repay its allocated portion of the cost of constructing the All-American Canal. Early in the negotiations, a question arose as to whether the Project Act made the acreage limitation law applicable to waters delivered through the canal, for if it did the contract would have had to have included elaborate provisions for the breakup and disposition of farms exceeding 160 acres, as required by § 46 of the 1926 Omnibus Adjustment Act. The representatives of the Department of the Interior concluded that the Project Act did not impose the acreage limitation provisions of general reclamation law, and the elaborate contractual provisions used by the Department in § 46 contracts were deliberately excluded from the Contract which the Department negotiated with the District. The Contract was executed by the Secretary and the District on December 1, 1932. State law and the Contract required electoral approval, and in a special election conducted on January 16, 1933, the voters of the District approved the Contract, free of acreage limitation restrictions, by a margin of 4,947 to 729.

The Proceedings in *Hewes v. All Persons.* The federal government required the District to obtain a judgment confirming the validity of the Contract in accordance with

California law. Accordingly, the District brought an *in rem* action in the Superior Court for Imperial County, captioned *Hewes v. All Persons.* One landowner defendant in that proceeding, Charles T. Malan, attacked the Contract, alleging that § 5 of the 1902 Reclamation Act would apply so as to deprive him of the right to receive water for his lands in excess of 160 acres. LX-AT. On February 24, 1933, in specific response to this allegation in the *Hewes* case, Secretary of the Interior Ray Lyman Wilbur promulgated a letter ruling, holding that the Boulder Canyon Project Act does not make the land limitation provision of § 5 of the Reclamation Act applicable to privately owned lands in the District. LX-AO. Seven days later, the Assistant Commissioner and Chief Counsel of the Bureau of Reclamation issued a letter confirming that it was the Department's position that § 46 of the 1926 Act likewise did not apply to Imperial Valley under the terms of the Project Act. LX-AR.

On July 1, 1933, following the Wilbur ruling, judgment was rendered in the *Hewes* case confirming the validity and legality of the Contract. LX-BC. In its opinion, the court held that "Section 5 of the Reclamation Law does not apply" under the Project Act to lands in the Imperial Irrigation District. App. 124a-125a. The *Hewes* judgment became final on February 26, 1934 after dismissal of an appeal.

The Department of the Interior monitored the *Hewes* case closely, and, while the case was still pending, Wilbur's successor, Secretary Harold Ickes, ruled that under § 4(b) of the Project Act a final judgment had to be entered in the *Hewes* proceeding before any appropriations could be sought for construction of the All-American Canal. Once the judgment in *Hewes* became final, the Department submitted the Contract to Congress and appropriations issued during the succeeding years for construction of the canal.

Administrative Interpretation of the Project Act. Construction of the canal commenced in August 1934. The first deliveries of water through the canal were made in 1940, and in 1942 the District ceased using the Alamo Canal and ultimately relinquished all its interest in that facility. On

March 4, 1952, the Contract between the government and the District was amended and supplemented. No claim was made at that time that land use restrictions should be incorporated into the amended contract.

Throughout these years, the Department of the Interior consistently adhered to the Wilbur Ruling and kept Congress advised of that ruling. *E.g., Hearings on H.R. 3961,* 78th Cong., 2d Sess., Part IV, pp. 599, 764-65 (1944); *Hearings on S. 1425, S. 2541 and S. 3448,* 85th Cong., 2d Sess., Appendix C, pp. 7, 11, 19 (1958). In 1942, the Federal Land Bank, which was making loans on farm lands in the District, inquired as to whether mortgage loans on farms in the District could be jeopardized by imposition of land limitation provisions. Commissioner Page of the Bureau of Reclamation advised the Land Bank that in accordance with the 1933 Wilbur ruling and the decision in *Hewes v. All Persons,* it was the opinion of the Bureau of Reclamation that "the limitation does not apply to such lands." LX-BR. Assistant Reclamation Commissioner Warne took the same position before Congress. *Hearings on H.R. 3961, supra.* In 1948, Secretary of the Interior Krug reaffirmed the Wilbur ruling, and Solicitor White of the Department of the Interior concurred in that action. LX-BU, LX-CR. In 1958 similar action was taken by Secretary Seaton's solicitor, Elmer Bennett. LX-CS.

The Proceedings in *Arizona v. California.* In 1952 Arizona initiated litigation in this Court, seeking an apportionment of the water of the Colorado River. In 1963, this Court issued its decision, holding that the contracting powers granted the Secretary in § 5 of the Project Act vest him with broad authority to apportion the river's water among the Lower Basin states and among users within the states, subject to certain restrictions found in the Act. *Arizona v. California,* 373 U.S. 546. "One of the most significant" of such restrictions, stated the Court, is § 6's mandate, derived from Article VIII of the Colorado River Compact, requiring the Secretary "to satisfy present perfected rights." *Id.* at 584. In its decree, the Court enjoined the United States from operating the project facilities other than in accordance with the mandate of § 6, including the requirement for

"satisfaction of present perfected rights." 376 U.S. at 342. Further proceedings ensued in order to quantify such "present perfected rights." Early this year, on January 9, 1979, this Court issued its Supplemental Decree in *Arizona v. California,* providing that the Imperial Irrigation District's present perfected rights have a priority date of 1901 and amount to 2,600,000 acre feet of water annually or the quantity necessary to irrigate 424,145 acres, whichever is less. 439 U.S. 419, 58 L. Ed.2d 627, 633 (1979).

This Action. While the proceedings in *Arizona v. California* were taking their course, the within litigation arose, sparked by an opinion which was issued on December 31, 1964 by Frank Barry, then Solicitor of the Department of the Interior. 71 I.D. 496. Barry's opinion criticized the Department's longstanding adherence to the Wilbur Ruling and concluded that the Boulder Canyon Project Act should have been construed as expressing a congressional intention to make acreage limitation provisions in general reclamation law applicable to privately owned lands in Imperial Valley. After the District Court rejected Barry's opinion and confirmed the longstanding interpretation of the Project Act, the Solicitor General publicly acknowledged the correctness of the decision and announced that the government would not appeal. Respondents' intervention then ensued, leading ultimately to the decision of the Ninth Circuit panel below.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision, without any pretense of judicial restraint, forcibly brushes aside 50 years of history to arrive at an interpretation of the Boulder Canyon Project Act which will deny water to half the farmlands in the Imperial Valley of California and devastate the lives and property rights of all citizens of that region. The decision merits review by this Court, not only because of its terrible human consequences, but because it plays havoc with basic principles of federalism and federal law.

First, the court misapplied a provision of California water law in order to circumvent an *in rem* judgment rendered by the California courts in 1933, thereby nullifying the intended effect of California's 82-year-old system for judicial confirmation of irrigation district contracts with the United States. In so doing, the court below violated principles set forth in *California v. United States,* 438 U.S. 645 (1978), and just as clearly violated the obligation of federal courts, specifically mandated by 28 U.S.C. § 1738, to accord full faith and credit to the judgments of state courts. The court's decision not only undermines California law, but also casts doubt on similar statutory schemes in the other Western States.

Second, by holding that the Secretary of the Interior must deny water to over half of the Imperial Irrigation District's farmlands, the Ninth Circuit panel directly negated this Court's decision and decree in *Arizona v. California* which order the Secretary to satisfy the District's present perfected rights with water sufficient to irrigate all 424,145 acres of the District's farmlands.

Third, in blind pursuit of its latter-day revelation of historical truth, the court below did the opposite of what this Court has repeatedly commanded: it sought by every device of its considerable ingenuity to criticize the longstanding administrative construction instead of looking for a reasonable basis to support the conscientious practice of three generations of public servants. The court relentlessly and sometimes disingenuously resolved every doubt and uncertainty in favor of its chosen interpretation of the Project Act, refusing to acknowledge or give weight to the reasonable grounds that supported adherence to the Wilbur interpretation through the course of five administrations since the passage of the Act. By so doing, the Ninth Circuit panel caused precisely what the principle of deference to administrative construction is designed to prevent — a devastating and widespread disruption of property rights acquired and expectations formed in reliance on the presumed validity of the longstanding governmental practice.

Finally, the Court of Appeals exercised its judicial power in plain violation of Article III's standing limitation. After the United States government decided not to prosecute the case on appeal, the Ninth Circuit reached out to decide the merits solely at the behest of persons who do not have even an arguable claim to standing under this Court's decisions.

If the Ninth Circuit's decision is allowed to stand, the social and economic impact in the Imperial Valley will be catastrophic. Currently, the average size of farms in harvested cropland in the Valley is about 590 acres. Approximately 800 farms are operated in units exceeding 160 acres in size, and together they account for 91.5% of the lands cultivated in the Valley. II CR 20. More than half the land in the Valley, or approximately 233,000 acres, is land in excess of 160 acres per single ownership. II CR 18. These lands are cultivated by family farmers, not absentee corporate enterprises. Approximately 95% of the Valley's farms are family enterprises, and together they account for 93% of the net irrigable acreage in the Valley.[1]

In a very real sense, Imperial Valley's entire economy is dependent upon, and reflective of, the longstanding interpretation of the law which the Court of Appeals rejected. The contentions raised by respondents, and adopted by the Court of Appeals, were seemingly put to rest four decades ago when Secretary Wilbur made his ruling and when the decision in *Hewes v. All Persons* was rendered. Since then, thousands of individuals have planned their lives, ordered their affairs and invested their capital and labor in developing farming operations which would be wiped out if the administrative interpretations upon which they relied were now overturned. The losses which would be inflicted on these persons by a reversal of the past are enormous, and would necessarily result in severe economic and social dislocation throughout the Valley.

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1. *Acreage Limitations in Bureau of Reclamation Projects,* Hearings before Subcomm. on Public Lands and Resources of Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Part 3, p. 436 (1978).

I. IN REFUSING TO ACCORD THE *HEWES* CONFIRMATION DECISION FULL FAITH AND CREDIT, THE COURT OF APPEALS NULLIFIED ONE OF THE ESSENTIAL ASPECTS OF CALIFORNIA'S IRRIGATION DISTRICT SYSTEM AND PLACED IN SUBSTANTIAL DOUBT THE STABILITY OF SIMILAR SCHEMES IN THE OTHER WESTERN STATES.

In *Hewes v. All Persons,* the California courts entered a judgment that the acreage limitation provisions of federal reclamation law do not apply to Imperial Valley under the terms of the Project Act. Under state law this judgment is "binding on the world at large." *Santa Barbara County Water Agency v. All Persons,* 47 Cal. 2d 699, 703, 306 P.2d 875, 878 (1957). The Court of Appeals refused to give the *Hewes* judgment the finality intended by state law. It avoided *Hewes* by asserting that the acreage limitation issue was "incidental and collateral to the judgment" and "was an interpretation of the terms of the contract that the [California] court was not entitled to make in a confirmation proceeding." 559 F.2d at 526, App. 24a. This holding is plainly wrong and denies full faith and credit to the *Hewes* judgment in violation of 28 U.S.C. § 1738.

But more is involved here than a simple misapplication of *res judicata* principles. By circumventing *Hewes,* the Court of Appeals nullified the primary purpose of the California irrigation district scheme. In that scheme, the *Hewes* judgment did not stand by itself; it was the culmination of an integral procedure designed to guarantee that the voters of Imperial Irrigation District would have the opportunity to approve the terms on which the District contracted with the federal government, and that once such approval was given, the obligations of the District would be fixed permanently by an *in rem* decree. By refusing to honor the decree that finalized the process, the court below rendered the whole procedure ineffectual, including the guarantee, intended by California law, of voter approval of the terms of the District's contract.

The impact of the panel's holding extends well beyond California. California's irrigation district statute has been used as a model by the other Western States.[1] In states using this scheme, the long-term stability of irrigation districts is secured by the integrity of the overall contracting system. Before a district can enter into a contract which will obligate its constituent landowners, an election to approve the contract must be held. Only then is the contract submitted for confirmation in a judicial proceeding in which "anyone interested" can challenge the contract on any ground. California Irrigation District Act of 1897, § 68, 1897 Cal.Stat. 254, 276; California Irrigation District Act of 1917, § 3, 1917 Cal.Stat. 243, 245. As a whole the procedure assures that the landowners, the contracting parties, and would-be bondholders know where they stand at the outset, and can order their affairs accordingly.

By avoiding the *Hewes* judgment and implying provisions into the All-American Canal contract that were intentionally excluded by the parties,[2] the Court of Appeals not only defeated the expectations of those who relied on the efficacy of the *Hewes* judgment, it denied the voters of Imperial Irrigation District their right to approve the contract in advance. As a practical matter, the careful frame-

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1. Ariz. Rev. Stat. §§ 45-1694D, 45-2169; Cal. Code of Civil Proc. §§ 860, 870; *see* former Cal. Water Code §§ 23225, 22670, 22671; Colo. Rev. Stat. §§ 37-44-145, 37-45-143, 37-46-131, 37-48-113; Idaho Code § 43-1808; *see* Idaho Code § 43-2204; Kan. Stat. § 42-721 (b); Mont. Rev. Code § 87-7-1957; Neb. Rev. Stat. § 46-1,151; Nev. Rev. Stat. §§ 539.305, 539.565, 539.567; N.Dak. Code § 61-24.2-12; Okla. Stat. Title 82, § 277.6(13); S.Dak. Code § 46-14-30; Tex. Stat. § 58.155; Utah Code §§ 73-7-48, 73-7-51; Wash. Code § 87.03.200, § 87.03.780; Wyo. Stat. § 41-7-602.

2. The Court of Appeals is mistaken in its assertion that "[t]here is no evidence that the Department reached a conclusion before entering the contract that the 160-acre limitation did not apply in the Imperial Valley." App. 46a. The Wilbur letter explicitly states:

> "Early in the negotiations leading to the All-American Canal contract the question was raised whether and to what extent the 160-acre limitation is applicable to land to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right." LX-AO.

work of governmental checks and balances embodied in California's statutory procedure for irrigation districts has been nullified. Such nullification repeats in another way the disregard for state water law that this Court condemned in *California v. United States*, 438 U.S. 645 (1978).

In *California v. United States*, the Ninth Circuit had held that the Reclamation Act bars California from implementing its statutory procedure for creation of appropriative water rights so as to impose conditions on the allocation of water to a federal reclamation project. This Court reversed, holding that "principles of comity and federalism," intended by Congress to be honored in the reclamation program, require the federal government to "defer to the substance, as well as the form, of state water law." *Id.* at 675. The same concern for "cooperative federalism" and the "need to observe state water law" (*id.* at 650, 678) dictate review of the Ninth Circuit's decision here.

The Ninth Circuit accomplished its *de facto* nullification of California's system for irrigation district contracts by a clumsy violation of hornbook rules of the law of judgments. The court hypothesized that the issue of acreage limitation was immaterial to the "validity" of the contract since a "decision that the Project Act incorporates the acreage limitations on private lands of the reclamation law into the contract would not make the contract invalid under federal law . . . or California law." 559 F.2d at 525; App. 23a. This hypothesis is dead wrong. The contract, as executed and approved by the voters, did not include any acreage limitation and divestiture provisions. If the state court had concluded (consistent with the opinion of the court below) that the Project Act incorporates § 46 of the 1926 Act, the contract's intentional exclusion of the § 46 provisions would have rendered it invalid under federal law. And under state law, the *Hewes* court could not have implied such provisions into the contract, contrary to the express intention of the contracting parties, because the voters of the District had never approved any such contractual obligations. The only action proper for the *Hewes* court would have been rejection of the original contract with the requirement that the entire statutory process — including voter approval — be repeated for a contract with the land limitation provisions expressly included.[1] Thus, the *Hewes* court was *required* to adjudicate the acreage limitation issue since the absence of an acreage limitation provision was critically material to a determination of the contract's validity.

The conclusion that the acreage limitation issue was an appropriate and necessary question for the *Hewes* court to adjudicate is confirmed by precedent. The California Supreme Court treats acreage limitation issues as questions properly adjudicated in confirmation proceedings, and the California Supreme Court adjudicates acreage limitation issues in irrigation district contract confirmation proceedings.[2] Indeed, this Court's decision in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), was a review of acreage limitation questions arising in confirmation proceedings identical to *Hewes*. If the Ninth Circuit's preposterous assertions were correct, the holdings in the *Ivanhoe* litigation are mere *dicta* which any subsequent court can disregard.

The *Hewes* holding that the Project Act does not impose acreage limitation in Imperial Valley was correct on the merits for reasons too numerous to explore in this petition. The *res judicata* effect of *Hewes* does not depend, however, on agreement with that conclusion. Section 1738 of the Judicial Code requires that the judgment of the *Hewes* court be given full faith and credit, regardless of its reasoning. *United States v. Moser*, 266 U.S. 236 (1924).

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1. This is a critical distinction between the *Hewes* facts and the facts of *Ivanhoe v. All Persons* on which the Ninth Circuit purported to rely. In *Ivanhoe*, the contracts in issue did contain express acreage limitation provisions, and these provisions had obtained the requisite voter approval prior to judicial review. Thus, the *Ivanhoe* decisions did not purport to foist upon the voters of the Ivanhoe District contract limitations never submitted for their approval, much less to do so forty years after they had lost the practical option of rejecting the contract.

2. *Santa Barbara County Water Agency v. All Persons*, 47 Cal. 2d 699, 703, 306 P.2d 875, 878 (1957); *Ivanhoe Irr. Dist. v. All Persons*, 47 Cal. 2d 597, 606, 306 P.2d 824, 829 (1957).

Moreover, no federal interest is served by denying full faith and credit to the *Hewes* judgment. Just the opposite. *California v. United States* holds that federal reclamation practice should defer to and operate within important procedures of state water law absent a clear congressional directive to bypass such procedures. 438 U.S. at 673. Here, there is no explicit congressional directive to circumvent state confirmation proceedings. On the contrary, federal law has recognized state systems for judicial confirmation of irrigation district contracts, and provides for judicial validation of irrigation district contracts with the federal government in state proceedings. *See, e.g.*, Act of May 15, 1922, 43 U.S.C. § 511; 62 *Cong. Rec.* 3575, 3582.[1] Indeed, as noted above, the Department of the Interior explicitly required the District to obtain a confirmation judgment fixing the District's obligations under the All-American Canal contract, and Secretary Wilbur's successor, Secretary Ickes, ruled that appropriations for constructing the All-American Canal could not be sought until the *Hewes* proceedings were completed and the judgment final. Given this explicit federal recognition and utilization of the very procedures leading to the *Hewes* judgment, the principle of "cooperative federalism" mandated in *California v. United States* reinforces in the exact circumstances of this case what 28 U.S.C. § 1738 demands in the abstract — that full faith and credit should be accorded to the *Hewes* decision. Instead, the decision below negates the substance of California laws designed to protect the interests of the real people whose lives are affected by the All-American Canal contract, and undermines the certainty of confirmation judgments affecting irrigation district contracts in all the Western States.

1. In his statement to Congress advocating passage of the Act of May 15, 1922, the Secretary of the Interior described the state judicial proceedings contemplated by the Act: "The laws of all States provide for confirmation proceedings, jurisdiction over all persons being secured by publication, whereby the decree becomes conclusive upon all the world . . ." 62 *Cong. Rec.* 3588.

II. THE COURT OF APPEALS' DECISION WILL PRECLUDE SATISFACTION OF THE PRESENT PERFECTED WATER RIGHTS OF IMPERIAL IRRIGATION DISTRICT, CONTRARY TO THE COMMAND OF THIS COURT'S DECREE IN *ARIZONA v. CALIFORNIA*.

In *Arizona v. California*, 373 U.S. 546 (1963), this Court ruled that § 5 of the Project Act gives the Secretary of Interior broad discretion to allocate Colorado River water by contract among users in the Lower Basin states. *Id.* at 580. This power, however, is subject to certain limitations provided in the Act itself. In particular, § 6 of the Project Act is a "clear and unequivocal" limitation on the Secretary's § 5 contracting power (*id.* at 581) which "requires satisfaction of 'present perfected rights.'" *Id.* at 566. Such rights "are entitled to priority under the Act." *Id.* at 600. In short, § 6 is, as this Court emphasized,

> "One of the most significant limitations in the Act . . . ." *Id.* at 584.

And it means exactly what it says, *i.e.*,

> ". . . that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.*

When Congress enacted § 6, there was no doubt as to the identity of "those who had reduced their water rights to actual beneficial use." Article VIII of the Compact had been specifically drafted to protect the water rights of the landowners in Imperial Valley. *Hearings Pursuant to S.Res. 320,* Sen. Comm. on Irr. & Recl. 68th Cong., 2d Sess., p. 678 (1925). During the congressional hearings the term "present perfected rights" was consistently explained by reference to the "valid appropriations" of "the lands in Imperial Valley." *Hearings on H.R. 2903,* House Comm. on Irr. & Recl., 68th Cong., 1st Sess. 1769 (1924); *Hearings on H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess. 167 (1926).

In its decree in *Arizona v. California,* this Court defined a "perfected right" as a water right "acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works. . . ." 376 U.S. at 341. A "present perfected right" is a perfected right that existed as of the effective date of the Project Act. As of the effective date of the Project Act, 424,124 acres of land were under irrigation in Imperial Valley, using water from the Colorado River pursuant to vested rights, the perfection of which had been commenced in 1901. Under this Court's decree, the Imperial Irrigation District's present perfected rights are measured by the beneficial water usage on that specific acreage.[1] And, the Secretary of the Interior is forbidden to release water from Hoover Dam for irrigation without providing for satisfaction of those rights. *Id.*

If acreage limitation were to be applied in the Valley, the Secretary would be under a duty to cut off water to 233,000 of the 424,124 acres which account for and are the beneficiaries of the District's present perfected rights. As the District Court emphasized, such a concept of shutting off water to more than half the lands whose prior beneficial use of water is the measure of the District's present perfected rights cannot be squared with § 6's mandate and this Court's decree commanding full satisfaction of the District's present perfected rights. 322 F. Supp. at 18; App. 83a.

In order to sustain its chosen reading of the Project Act, the Ninth Circuit panel had to construct an argument purporting to reconcile the incompatibility between the Secretary's clear § 6 duty and the duty he would be under if § 46 of the 1926 Act were applicable to privately owned lands in the Valley. Seizing upon a provision in California law, which provides that *legal title* to irrigation water is

1. Thus, in a Supplemental Decree issued on January 9, 1979, this Court determined that the present perfected rights of Imperial Irrigation District amount to 2.6 million acre feet per year, or the quantity necessary to irrigate 424,124 acres, whichever is less, with a priority date of 1901. 439 U.S. 419; 58 L.Ed.2d 627, 633 (1979).

held by the District in trust for its constituent landowners, the Court devised a theory that the Secretary's § 6 duty is only owed to the District, as holder of the legal title to the Valley's present perfected rights, and that once water is formally delivered to the District, the Secretary could compel the District to withhold distribution of that water to 233,000 acres of its constituent farmland without in any way violating his § 6 duty. This hypertechnical theory would trivialize § 6's mandate for satisfaction of present perfected rights and make a travesty of the promise made to Imperial Valley's farmers in Article VIII of the Colorado River Compact.

It is an indisputable fact under California water law that while the legal title to water rights is held by a District, it holds title solely as a trustee for its constituent landowners who are the equitable beneficiaries of the rights. *Merchants National Bank of San Diego v. Escondido Irr. Dist.,* 144 Cal. 329, 334, 77 Pac. 937, 939 (1904). It is senseless to assume that when Congress mandated full satisfaction of the present perfected rights which are held by the District as trustee, it intended at the same time that the Secretary should compel this trustee to withhold the water from the very lands for which the rights are held in trust. The Congress which enacted § 6 of the Project Act was concerned about people — the landowners whose prior use of Colorado River water created the present perfected rights — not with legal fictions.

The decree in *Arizona v. California* requires that the Secretary honor the provisions of the Colorado River Compact that present perfected rights are to be "unimpaired." Token delivery of water to the District, where the District is prohibited from distributing that water to more than one-half of the acres entitled to its beneficial use, is "impairment," not "satisfaction," of those rights in any sane usage of those words.

To suggest otherwise is to suggest that the solemn pledges contained in the Colorado River Compact, in § 6 of the Project Act, and in the decree in *Arizona v. California* that present perfected rights would be honored —

pledges that this Court has said were of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Project Act became effective"—were no more, in Justice Jackson's phrase, than a "teasing illusion like a munificent bequest in a pauper's will."[1] It does no credit to Congress or to government generally to find that it indulged in such pettifoggery.

III. THE COURT OF APPEALS' OPINION IS A WILLFUL VIOLATION OF THIS COURT'S DECISIONS REQUIRING JUDICIAL DEFERENCE TO LONGSTANDING ADMINISTRATIVE CONSTRUCTIONS.

This Court has always commanded the judiciary to accord every reasonable doubt to statutory constructions which underlie longstanding administrative practices. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978). Adherence to this principle is necessary "for the establishment and enforcement of justice . . . between the government and those who deal with it and put faith in the action of its constituted authorities. . . ." *United States v. Hill*, 120 U.S. 169, 182-83 (1887). In its opinion below, the Ninth Circuit panel disregarded this principle and did the exact opposite; it launched a relentless, unprincipled attack on the longstanding construction of the Boulder Canyon Project Act, fully aware that such assault would devastate important property rights and honest human expectations.

In quest of its chosen result, the Court of Appeals focused on the general references made in the Project Act to the reclamation law. Although none of these references mentions acreage limitation and although they are expressly subordinated to numerous specific provisions in the Act which are inconsistent with any notion of acreage limitation,[2]

1. *Edwards v. California*, 314 U.S. 160, 181 (1941) (concurring opinion).

2. See §§ 5, 6, 8(a), 9 and 13, and the District Court's analysis of these provisions, 322 F.Supp. at 18, App. 80a-84a.

the court peremptorily announced that "it is apparent" that acreage limitation applies because the statutory "language directly mandat[es] application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District." 559 F.2d at 527, App. 26a, 27a. The Ninth Circuit clearly violated this Court's dictates in opting for its own reading of a few of the Act's terms. This Court has repeatedly admonished that a settled administrative construction should not be overturned simply because it might be contrary to the reviewing court's "reading of the bare words of the statute." *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958). *Cf. Saxbe v. Bustos*, 419 U.S. 65, 74-75 (1974).

Under the decisions of this Court, a presumption of validity must be accorded contemporaneous administrative constructions, and that presumption can only be overcome by a showing that the statute is "so plain in its command" and "so clearly expressed as to exclude . . . argument in support" of the administrative construction. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933); *Hewitt v. Schultz*, 180 U.S. 139, 156-57 (1901). Here, the Ninth Circuit did just the opposite. It reasoned that the interpretation it divined from the Act's bare words was unassailably valid unless foreclosed by overwhelmingly clear and "express" evidence to the contrary.

The court attempted to justify its upside-down approach by invoking a passing comment made by this Court in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. at 292, to the effect that Congress has always made exemptions from acreage limitation "by express enactment." As the District Court correctly pointed out, however, the practice mentioned in *Ivanhoe* did not commence until 1938, and thus cannot logically support *any* inference about the intent of a Congress that acted a decade earlier. 322 F.Supp. at 20, App. 85a. Moreover, the *Ivanhoe* comment was clearly not conceived by this Court as legitimizing reversal of the presumption of validity accorded longstanding administrative constructions. Indeed, the *Ivanhoe* Court invoked administrative construction to support its holding. 357 U.S. at 293. In *California v. United States*, 438 U.S. at 676, this Court warned against reading too much into "the unnecessarily

broad language of the Court's opinion in Ivanhoe," but that is just what the Court of Appeals did here.

Given its misreading of *Ivanhoe*, the panel below did not follow this Court's directive to inquire whether "the intention of Congress [was] . . . so clearly expressed as to exclude construction or argument" in support of the decades-old interpretation of the Boulder Canyon Project Act. *Hewitt v. Schultz*, 180 U.S. at 156-57. Instead, it turned the tables and inquired whether the intent of Congress was so clearly expressed as to evidence an "express enactment" excluding construction or argument in favor of the Court's reinterpretation of the Act.

This fundamental misdirection of approach permeates the Ninth Circuit panel's opinion. Instead of resolving doubts in favor of Secretary Wilbur's ruling, the Court engaged in an essentially captious, and sometimes disingenuous, attack on the Secretary's reasoning.[1] Instead of acknowledging the many reasonable arguments that can be made from the statutory language in support of the historical interpretation of the Act, the Court stretched in the other direction, and in the case of § 6's mandate for satisfaction of present

1. The court repeatedly belittles the Wilbur letter for addressing § 5 of the 1902 Act rather than § 46 of the 1926 Act. 559 F.2d at 537-39; App. 44a-46a. But since Secretary Wilbur's letter addressed Malan's allegation in *Hewes* regarding § 5, there was good reason to focus the analysis on § 5. Moreover, seven days after the Secretary's ruling, the Department issued a letter, under signature of Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, taking the position that the same principles discussed in the Wilbur letter applied to, and precluded application of, § 46 of the Omnibus Adjustment Act. LX-AR. The Court of Appeals relegated the Dent letter to a footnote, stating that "there is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer." 559 F.2d at 538 n.67, App. 46a-47a. That is a flagrant misstatement. Throughout the 12 years of this litigation, petitioners have consistently invoked Chief Counsel Dent's letter as being part and parcel of the Department's 1933 construction.

perfected rights, strained to contrive an interpretation consonant with its desired result. *See* 559 F.2d at 528-30, App. 29a-31a.

Nowhere is the court's misdirected bias more evident than in its treatment of the Project Act's legislative history, particularly the statements made in Committee hearings by Commissioner Mead and Congressman Swing. During the hearings on the Act, Congressman Swing, who was the Valley's congressman and the bill's chief sponsor, testified that the Act would *not* make acreage limitations contained in the reclamation law applicable in Imperial Valley. *Hearings on H.R. 6251*, 69th Cong., 1st Sess., pp. 32-33 (1926); LX-DD. Dr. Elwood Mead, the Commissioner of Reclamation and the Department of the Interior's chief witness in the hearings, stated that nothing in the Act would restrict the acreage of farm units in the Valley. *Hearings on H.R. 6251, supra.* On four occasions in 1927 and 1928, Senators intimately familiar with the reclamation law unsuccessfully proposed amendments that specifically would have imposed acreage limitations on privately owned lands in the Valley, as the Act specifically provided in § 9 with respect to public lands only. LX-CU; LX-DU; LX-DD(H); LX-DD(M). The Senate Report on the bill in 1928 was accompanied by a minority report which pointed out that the bill would not subject privately owned lands to a 160-acre limitation. S. Rep. No. 592, 70th Cong., 1st Sess., Part II, pp. 3, 5 and 26 (1928); LX-DD(J). During the Senate debates, Senators Hayden and Ashurst emphasized that the Act would not subject private lands to acreage limitations. 69 *Cong. Rec.* 7634-35, 9451, 10471, 10495; 70 *Cong. Rec.* 289. Most significantly, during the long course of congressional hearings and debates there was *no one*, whether supporter or opponent, who said that acreage limitation would apply in Imperial Valley under the Project Act as passed.

Rather than acknowledge the support found in this legislative history for argument in favor of the longstanding interpretation of the Act, the Court of Appeals stretched to discount the legislative evidence at every turn. The court's contrived explanation of the testimony by Congressman Swing and Commissioner Mead[1] is illustrative. During the 1926 hearings, Congressman Swing and Dr. Mead engaged in the following exchange with members of the House Committee on Irrigation and Reclamation:

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DR MEAD. Yes, Sir.

"MR. SINNOTT. No matter what that might be?

"DR. MEAD. Yes.

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, *as is now in the present reclamation law?*

"MR. SWING. No, Sir." *Hearings on H.R. 6251,* 69th Cong. 1st Sess. 33 (1926) (emphasis supplied).

Unable to reconcile this statement by the Act's author with its own theory of the Act's purpose, the Court of Appeals simply brushed Congressman Swing's statement aside with the observation that it "was not made with reference to any particular portion of the bill." 559 F.2d at 532, App. 36a. Then the court disingenuously side-stepped Dr.

1. There is no more persuasive voice on the policy of the federal reclamation program than Mead's. As this Court noted in *California v. United States,* 438 U.S. at 654 n.9, "Dr. Mead was a principal witness before Congress during the hearings on the Reclamation Act of 1902 and later became Commissioner of Reclamation, serving in that position from 1924 until his death in 1936." Lake Mead, the storage reservoir for Hoover Dam, honors his contributions to the Boulder Canyon Project.

Mead's testimony by hypothesizing that the Commissioner intended his remarks to mean that a 160-acre limitation would apply but that there would be no requirement for divestiture of lands exceeding 160 acres.[1]

Ultimately, the Court of Appeals capped its rejection of the legislative history with the following observation:

> "[T]he legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created." 559 F.2d at 535, App. 41a.

This reasoning not only resolves all doubt against, rather than in favor of, the historical construction of the Act, but it clearly overlooks a more likely inference to be drawn from the sparsity of comments about acreage limitation in the historical record — presumably, more extended discussion of the issue would have occurred if the Act had been construed as requiring breakup of the pattern of landownership and farming in the Imperial Valley which was then almost three decades old. Surely the many witnesses from the Imperial Valley who appeared before Congress urging passage of the Act would not have acquiesced in such a drastic measure without extensive protestation and debate.

In *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915), this Court explained why the long-continued existence of an administrative interpretation should establish a strong legal presumption of its validity:

> "[G]overnment is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally

1. The court attempted to justify this nonsensical translation of Dr. Mead's words by noting that § 46 of the 1926 Act was not enacted until two months later, falsely implying that there was "no applicable divestiture provision for excess lands" in the reclamation law at the time of Mead's testimony. 559 F.2d at 533, App. 37a. In point of truth, there was an applicable divestiture provision in the reclamation law at the time of Commissioner Mead's testimony, and Dr. Mead was obviously aware of it since it had been on the books for 12 years. It was § 12 of the Reclamation Extension Act of 1914, 38 Stat. 689; it is still in the law, 43 U.S.C. § 418.

adjust themselves to any long-continued action of the Executive Department — on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystalize into regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation." *Id.* at 472-73.

That "wise and quieting rule" was followed by the District Court, but ignored by the Court of Appeals. Unless this Court now intervenes, the Court of Appeals' decision will cause widespread social and economic loss to thousands who have ordered their lives and dealt with the government upon the faith of the historic interpretation of the Project Act.

It would be ironic indeed if the Reclamation Act of 1902, the purpose of which was to make "homes out of territory of the United States now practically uninhabited" (35 *Cong. Rec.* 6774), were to become the instrument of destruction of communities now 70 years old, and the means of forced resettlement of lands which have been settled and continuously farmed for more than four generations.

IV. IN REACHING OUT TO REVERSE A JUDGMENT THAT THE UNITED STATES DECIDED SHOULD NOT BE APPEALED, THE COURT OF APPEALS CLEARLY EXCEEDED THE LIMITS OF JUDICIAL POWER PRESCRIBED BY ARTICLE III OF THE CONSTITUTION.

Under this Court's decisions in *Warth v. Seldin,* 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Org'n,* 426 U.S. 26 (1976), standing under Article III requires a showing that the purported litigant has sustained a "particularized injury" that resulted "in a concretely demonstrable way" from the violations alleged. *Warth v. Seldin,* 422 U.S. at 504. "Put otherwise, [the question is whether] the exercise of the Court's remedial powers would

redress the claimed injuries." *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74 (1978).

The *Warth* case addressed squarely the issue of what must be shown by a plaintiff who bases his claim of standing on the contention that, but for defendant's violation of law, plaintiff would have been able to purchase property. In *Warth,* petitioners based their claim of standing on the contention that they had been unable to buy houses in the village of Penfield because of allegedly restrictive and discriminatory zoning practices followed by the village. They alleged that each of them had made concrete efforts to purchase, and that their efforts had proven fruitless because the price of houses in Penfield was greater than they could afford. This Court held that petitioners lacked standing, on the ground that the facts alleged failed to show "an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." 422 U.S. at 507. In particular, this Court said, the record was devoid

> "of any indication that [any contemplated housing project] would have satisfied petitioners' needs *at prices they could afford,* or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary — that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Id.* at 506 (emphasis supplied).

Like petitioners in *Warth,* respondents here base their claim of standing on their alleged desire to purchase property — here, irrigated farmland — and allege that the current price of the property they desire to purchase exceeds their means. Like petitioners in *Warth,* however, respondents have entirely failed to allege that any relief the court could grant would make land available *at a price respondents could afford.* Respondents' showing here, indeed, is measurably inferior to the insufficient showing made in *Warth*: unlike petitioners in *Warth,* no respondent here alleged any effort, at any time, to purchase farmland in Imperial Irrigation District.

In support of their claim to standing in this case, respondents filed eleven short affidavits, ten of which were identically worded (except for the affiants' names and addresses) as follows:

> "1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, 'Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants'; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.
>
> "2. My address is. . . .
>
> "3. My occupation is agricultural worker.
>
> "4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District." I CR 172 *et seq.*

One affidavit, that of respondent Yellen, additionally stated:

> "5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would *attempt* to purchase to purchase [sic] the excess lands under the terms and conditions set by the Secretary of the Interior.
>
> "6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately $25.00 to $50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between $1200.00 to $1400.00 per acre."
>
> I CR 170 (emphasis supplied).

These meager statements do not show what price respondents could afford to pay for land or that there is any substantial likelihood that application of acreage limitations would result in prices they could afford and would pay. In short, there is no showing whatever that nonapplication of acreage limitations has thwarted respondents' "desire" to buy farmland or that enforcement of acreage limitation would result in gratification of their desire.

The Court of Appeals attempted to gloss over this deficiency by asserting that *if* respondents were to buy land in Imperial Valley they would have to pay prices higher than they would pay if § 46 applied to the private landowners in the area. 559 F.2d at 522, App. 16a. Thus, the Court of Appeals concluded that respondents' standing can be predicated solely on an interest in seeing land prices reduced generally, without requiring any proof of respondents' ability to purchase at those unspecified lower prices. Thus the court characterized respondents' interest as "an interest only in reducing land prices, not an interest in reducing land prices to any specific level." *Id.* That reasoning flies directly in the face of this Court's holding in *Warth v. Seldin* that standing cannot be established by the mere allegation of an interest in seeing current market prices reduced.

Article III's standing requirement is intended to foreclose the exercise of judicial power at the behest of partisans who have no stake in the issues presented for adjudication other than vindication of their individual notions of right and wrong. That purpose is particularly important in situations, such as this, where judicial power is invoked to reverse history, overturn longstanding legal interpretations and change a community's social and economic structure. Such extraordinarily Draconian objectives should not lightly be undertaken by the judiciary unless those seeking to invoke the judicial power can clearly establish the existence of standing.

Here, the Court of Appeals overreached the limits of its Article III power in acting at respondents' behest, and in so doing, it has rendered an advisory opinion which will have an incalculably disastrous effect on the citizens of the Imperial Valley. Such improvident and unnecessary exercise of judicial power is precisely what Article III is designed to prevent.

V. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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September 14, 1979

79-421

Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-.....

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al.,
Defendants-Appellees,

State of California, Defendant-Appellee,

Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS* et al.,
Defendants-Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS* et al.,
Defendants-Appellants,

W. L. Jacobs et al.,
Defendants-Appellants.

Nos. 71-2124, 73-1333, 73-1388.

United States Court of Appeals,
Ninth Circuit.

Aug. 18, 1977.

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* Walter J. Hickel, as Secretary of the Interior, was the originally named defendant. We substitute the name of his present successor in office. F.R.App.P. 43(c).

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG,** District Judge.

WOLLENBERG, District Judge:

The Imperial Valley in southern California is a highly productive agricultural area. This is due to an extensive irrigation system which distributes water obtained from the Colorado River, for without this irrigation water the Imperial Valley would be an unproductive desert. At issue in these cases is whether certain restrictions in the reclamation laws limit the delivery of irrigation water to resident landowners and whether water deliveries are limited to only 160 acres of the property held by each private landowner.

I. Historical Overview.

Because it is almost entirely below sea level, it was recognized as early as the middle of the nineteenth century that irrigation of the Imperial Valley with water diverted from the Colorado River was possible by gravity flow. A private corporation organized in 1896 as the California Development Corporation made the initial appropriations and diversions of Colorado River water. The water was taken from the River just north of the boundary between Mexico and the United States. However, in order to avoid high mesa and sandhill country north of the international boundary that separated the Colorado River from the Imperial Valley, the water was carried by canal for approximately 50 miles through Mexico. After the canal reentered the United States, the water was distributed to land in the Imperial Valley through a system of irrigation canals owned by seven mutual water companies. These water companies had been organized by the California

**The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

Development Company and were later acquired by the individual landowners whose land received the water.

In 1905, the Colorado River broke through its banks with disastrous results. The River changed its course and for many months flowed through the washed-out intake of the California Development Company into the canal in Mexico and then into the Imperial Valley. The flood created the Salton Sea with a surface area of over 330,000 acres within the Imperial Valley and threatened to destroy the entire area. The California Development Company could not contain the River. Danger to the tracks of the Southern Pacific led that company to advance funds to the California Development Company to control the River, and the railroad took a controlling interest in the Development Company as security. The railroad eventually succeeded itself in closing the breach in the river bank and returned the River to its channel. In 1916, the railroad foreclosed on the Development Company's interests and then transferred those interests to the Imperial Irrigation District (hereinafter "District").[1]

At first, the District distributed water to the seven mutual water companies on a wholesale basis. By 1923, however, the District acquired all of the mutual water companies. Since then, it has been the only entity diverting, transporting, and supplying water from the Colorado River to agricultural lands in the Imperial Valley.

The interstate allocation of water from the Colorado River, control of flooding, regulation of water supplies on a predictable and useful basis, and the construction of a canal to the Imperial Valley that did not pass through Mexico were major concerns of not only Imperial Valley landowners but of the seven states in the Colorado Basin during the early years of the 1900s. Extensive efforts to resolve these problems led first to the agreement in 1922 between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming known as the Colorado River Compact and

1. The District, an agency of the State of California, was formed in 1911. See Cal.Water Code §§ 20500 *et seq.*

then to the passage in 1928 of the Boulder Canyon Project Act (hereinafter "Project Act"). 45 Stat. 1057, 43 U.S.C. §§617 *et seq.* The Project Act provided, *inter alia,* for ratification of the Colorado River Compact, the construction of Boulder (now, Hoover) Dam, and the construction of Imperial Dam where water was to be diverted to a canal running to the Imperial Valley. The canal was to run entirely through United States territory and hence received the name All-American Canal.

By the time the Project Act became effective in 1929, extensive private efforts had resulted in irrigation of almost 425,000 acres in the Imperial Valley. Since then, very little additional irrigated land has been added in the District. In 1932, the District entered into a contract with the United States providing for the construction of the Imperial Dam and the All-American Canal by the United States and repayment of certain costs by the District. Landowners in the Coachella Valley, north of the Imperial Valley, formed their own water district and eventually negotiated their own contract with the government for construction of facilities to deliver water to that Valley. Water delivery to the Imperial Valley through the All-American Canal began in 1940 and since 1942 the District's entire water supply has been carried through the All-American Canal. The District subsequently disposed of its interest in Mexico.

The 1932 contract with the District did not specifically provide for any acreage limitations on private lands receiving water through the massive projects being built by the United States. Due to the combination of a 1933 letter from the Secretary of the Interior to the District and the inaction of the Department of the Interior, no acreage limitations that were contained in the reclamation laws were enforced with respect to privately owned lands in the Imperial Valley. In 1964, the Solicitor of the Department of the Interior concluded that the previous Department interpretation of the law and administrative practice were incorrect and that the acreage limitations should apply to privately owned lands.

The Department of the Interior attempted to negotiate a new contract with the District that would incorporate acreage limitations but the negotiations failed. In 1967, therefore, the government filed an action for declaratory relief against the District. The complaint sought a declaratory judgment that the land limitation provisions of the reclamation law applied to privately owned lands in the District that received Colorado River water through the All-American Canal. The government specifically relied upon Section 46 of the Omnibus Adjustment Act of 1926, 44 Stats. 649, as amended, 43 U.S.C. § 423e (hereafter "Section 46"),[2] as the acreage limitation statute that applied.[3]

---

2. In pertinent part, Section 46 provides that:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Because of California's community property laws, a husband and wife may own 320 acres and still be in compliance with the reclamation law. For the sake of consistency with the statutory language, the limitation referred to throughout this opinion will be 160 acres.

3. For a more detailed historical account, see *United States v. Imperial Irrigation District,* 322 F.Supp. 11, 12-15 (S.D.Cal. 1971). Additional historical data will be referred to in the course of this opinion.

In its suit, the government did not rely upon Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. That statute contains an earlier version of acreage limitations on lands receiving water through federal reclamation projects. It also restricts the delivery of water through federal reclamation projects to lands owned by residents of the reclamation project area.[4] A group of Imperial Valley residents, dissatisfied with government nonenforcement of this statute in the Imperial Valley, brought suit in 1969 against the government to enforce the residency requirement of Section 5 of the Reclamation Act of 1902.

The government thus found itself in the position of claiming that, despite its previous inaction, one section of the reclamation law applied in the Imperial Valley while also defending its nonapplication of another section of the reclamation law which is in one respect similar to the statute it sought to apply. The cases were heard by two different judges and eventually the government's position was rejected in both cases. Before reaching the substantive matters raised in the appeals from these two decisions, we are obliged to consider procedural complications and questions of standing.

II. Standing.

A. *Yellen v. Andrus,* Nos. 73-1333, 73-1388.

This action (hereinafter "the residency case") was instituted by several individuals who resided within the boundaries of the Imperial Irrigation District but who owned no farm land in the District or anywhere else in the United States. They sought to compel the Secretary of the Interior and various officials of the Department of the Interior to enforce the residency requirements of Section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431.[5] Their case was

4. The precise scope of this restriction was hotly contested in the proceedings below.

5. In referring to the sale of rights to the use of water delivered through federal reclamation projects to private landowners, 43 U.S.C. § 431 provides, in pertinent part, that "no such sale shall *(Footnote continued on next page.)*

brought in the form of a mandamus action under 28 U.S.C. § 1361.

In 1971, the district court granted partial summary judgment against the government, holding that 43 U.S.C. § 431 applies to private lands within the Imperial Irrigation District receiving water from the Boulder Canyon Project through the All-American Canal. *Yellen v. Hickel,* 335 F.Supp. 200 (S.D.Cal. 1971). Thereafter, various landowners in the Imperial Valley intervened and raised arguments not previously set forth by the government. A full trial on the merits was then held. The district court issued findings of fact and conclusions of law and again held for the plaintiffs. *Yellen v. Hickel,* 352 F.Supp. 1300 (S.D.Cal. 1972). Judgment in favor of the plaintiffs was entered and both the government and the intervening landowners appealed.[6]

The issue of plaintiffs' standing to bring this action was considered at various times in the district court proceedings and was resolved in favor of the plaintiffs. See 352 F.Supp. at 1303-1304. In light of more recent Supreme Court decisions, this Court has not adopted the test for standing used by the district court in this case. *Bowker v. Morton,* 541 F.2d 1347, 1349 n.3 (9th Cir. 1976). At this Court's invitation, the parties have submitted additional briefs on the standing question in light of the *Bowker* decision.[7]

be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Act of June 17, 1902, c. 1093 § 5, 32 Stat. 389. Section 5 also contains limitations on the size of tracts for which rights to the use of water may be sold and conditions the permanent attachment of such rights on full payment by the landowner. The complaint did not seek enforcement of these portions of Section 5.

6. The government's appeal is No. 73-1333, and the appeal of intervening landowners is No. 73-1388.

7. While the standing issue was raised below, at one time during the course of this appeal it may not have been pressed by the appellants. However, "since jurisdiction to decide the case is implicated," the issue must be considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In *Bowker v. Morton,* a group of small family farmers in one area of California sought to compel the government to apply the federal reclamation laws, particularly the residency requirement of 43 U.S.C. § 431 and the statutes concerning excess land holdings, to an irrigation project in another area of California. Although injunctive relief against other landowners was sought, the most the *Bowker* plaintiffs could have obtained was an order requiring the government to enforce the reclamation laws and discontinue supplying water to lands not in compliance with the law. That is essentially the relief sought by the plaintiffs in this case, and the standing test enunciated in *Bowker* applies in this case as well. Distilled from the recent cases of *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that test, "compactly put, . . . is that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. Application of that test to the facts of this case leads to the conclusion that the plaintiffs have no standing to maintain this action.

In their amended complaint,[8] the plaintiffs alleged that they resided within the boundaries of the Imperial Irrigation District and in the vicinity of privately owned lands which are irrigated by water supplied through the federal reclamation project. They alleged that the only source of irrigation water in the Imperial Valley is the federal project. Much of the irrigated farm land in the area was alleged to be owned by persons who were not bona fide residents on the land and who were not residing in the neighborhood of the land. None of the plaintiffs owned any farm land and they alleged a desire to own farm land in the area. Because of the scant rainfall and lack of any other irrigation source, the plaintiffs would have to purchase lands irrigated with

8. The record on this appeal does not include a copy of the amended complaint. However, the amended complaint does appear in the record of the companion appeal, No. 71-2124, in the Clerk's Transcript, Volume 1, at pages 206-211.

water from the federal reclamation project in order to fulfill their desire to own farmland. The essence of their case is that their ownership desires have been blocked because the government, by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford. The district judge found that about half of the farms in the Imperial Irrigation District were owned by nonresidents and that enforcement of the residency requirement would bring "an immediate and substantial decline in the market value of farm land" in the District. He made no findings concerning the proportion of the farm acreage in the District owned by nonresidents or what his term "substantial decline" meant in terms of actual prices for farm acreage.[9]

In *Bowker,* the plaintiffs had not alleged that they desired to buy land in the area which they sought to bring under the provisions of the federal reclamation laws, and they did not state any prices which they could afford to pay should land be available for purchase. Consequently, their claim that failure to enforce the federal reclamation laws resulted in the unavailability of land for purchase at "reasonable" prices was held to fail to set out "a particularized injury resulting from the defendants' action." 541 F.2d at 1350. Here, plaintiffs do allege a desire to purchase farm land. However, there is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm.[10]

The relief sought by the plaintiffs in this case would not come through the government action they seek. The price

9. Findings of Fact XXIX, XXX. 352 F.Supp. at 1317.

10. Plaintiffs cannot assert injury in their status as taxpayers. *Bowker v. Morton, supra,* 541 F.2d at 1349 n.2. In addition, they cannot claim injury from any failure of the government to discharge its duty to the public. *Turner v. Kings River Conservation District,* 360 F.2d 184, 198 (9th Cir. 1966).

of land is determined by the relationship between the demand for and supply of land in the Imperial Valley. The land market would adjust to a new residency requirement but at levels that cannot be determined with any degree of precision and which may still be higher than plaintiffs can afford. It is indisputable that a wide variety of other government actions can also affect this land market. A change in tax regulations relating to agricultural land or a change in the crop support system for crops grown in the Imperial Valley could just as likely affect the price of agricultural land as an application of the residency requirement. In addition, plaintiffs' inability to afford farming land also stems from their insufficient income. A change in government regulations concerning loans for the purchase of agricultural lands or income support to agricultural workers could increase the plaintiffs' ability to purchase farming land without necessarily reducing the price of land. The injury plaintiffs allege — the inability to purchase farming land at prices they can afford — is neither particularized nor does it flow "concretely and demonstrably" from the government's activities, or lack of activity, challenged in the complaint.

Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. Nonresidents could move back to the area and continue to receive irrigation water for their lands.[11] Land placed for sale by non-residents

11. The government has contended that residency is not a continuing requirement for the delivery of water. See, e. g., 43 C.F.R. § 230.65. In that case, those nonresidents who were residents when they first began to receive water might be able to continue to receive that water even if the residency requirement of Section 5 was enforced. This would add a further factor of uncertainty when considering whether plaintiffs' injuries would be redressed by the order they seek. However, the district court rejected this *(Footnote continued on next page.)*

could be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices. Plaintiffs were not required to prove with absolute certainty that this aspect of the test for standing would be satisfied, but after a full trial we are still of the opinion that:

> [i]t is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs. . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.

Bowker v. Morton, supra, 541 F.2d at 1350.[12]

The conclusion that plaintiffs lack standing is not changed, as plaintiffs would suggest, by the decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d

interpretation of Section 5. Consequently, without expressing any opinion on the correct view of the problem, we do not consider the possibility that residents could continue to receive water for their lands even after they move out of the area when evaluating the standing problem.

12. This is not a case where remand to the district court for the purpose of making further relevant findings of fact would be appropriate. No individual plaintiff testified at the trial, and there is no other evidence which would support any findings on the desires of any individual plaintiff to purchase any particular farm. In addition, the testimony of the agricultural economist that forms the basis for the district court's finding that enforcement of the residency requirement would bring an "immediate and substantial" decline in land prices cannot support any findings more definite than the one the district court has already made. In fact, that testimony sets forth so many variables that must be considered in conjunction with a theoretical enforcement of the residency requirement that it supports, rather than detracts from, the conclusion that plaintiffs' injuries would not be redressed by the relief requested in this lawsuit. See Reporter's Transcript, pps. 254-277.

450 (1977). The individual plaintiff in that case alleged more than a desire to live in a certain municipality. Instead, he sought to live in a particular proposed housing development, and he would have qualified to live there had the development been built. The builder of the proposed project was a co-plaintiff, and the challenged action of the municipal government was a direct roadblock to the fulfillment of the desires of both plaintiffs. There was no generalized grievance where redress depended on speculation about the activities of third persons not parties in the lawsuit. 429 U.S. at 260-264, 97 S.Ct. 555. The plaintiffs herein, on the other hand, are like the individual plaintiffs who were found to lack standing in *Wrath v. Seldin, supra,* 422 U.S. at 502-508, 95 S.Ct. 2197.[13]

B. *United States v. Imperial Irrigation District,* No. 71-2124.

This appeal (hereinafter the "acreage case") comes to us in a different procedural posture from the residency case. Here, the complaint was filed by the government. It sought a declaration that the excess land provisions of the reclamation laws, particularly Section 46 of the Omnibus Adjustment Act of 1926, applied to privately owned lands in the Imperial Irrigation District that received irrigation water through the All-American Canal. There was no question of the government's standing. This case was not heard by the same judge who made the decisions in the residency case. In an opinion reported at 322 F.Supp. 11 (S.D.Cal. 1971), the district court ruled against the government. Judgment was entered, and the government decided not to appeal.

13. There is a second, nonconstitutional standing requirement that the interests of the plaintiffs be "arguably within the zone of interests to be protected or regulated" by the statute which plaintiffs seek to enforce. *Data Processing Serv. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969), cited in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 39 n.19, 96 S.Ct. 1917, 48 L.Ed.2d 450. Determination of this question would also be relevant to the determination of whether the government has a "duty" to plaintiffs which can be enforced by an action in the nature of mandamus under 28 U.S.C. § 1361. In view of our disposition of this case, there is no need to consider these questions as they arise in the context of this case.

After judgment had been entered and before the time for filing a notice of appeal had run out, a group substantially identical to the plaintiffs in the residency case filed a protective notice of appeal and sought leave to intervene.[14] The district court denied permission to intervene. On appeal, another panel of this Court reversed the district court's order denying permission to intervene, allowed intervention, and validated the protective notice of appeal. That panel further ordered that the appeal in this case be consolidated with the appeals in the residency case.

The unpublished order allowing intervention is attached as an appendix to this opinion. The order emphasized the two conflicting decisions from the district court concerning applicability of the reclamation laws and the responsibility of the court to resolve this problem if such a resolution were "feasible". Of course, that the panel did not have the residency appeal before it and could not anticipate our decision on standing in light of cases, such as *Bowker v. Morton, supra,* which had not been decided when intervention was allowed. Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order allowing intervention in the acreage case has disappeared.[15]

14. This group had previously been given permission to appear below as *amicus curiae.*

15. The order allowing intervention also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the "interested Imperial Valley landowners" as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of non-landowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court.

The Yellen intervenors urge that the order allowing intervention cannot be re-examined because of the "law of the case" doctrine. That doctrine, however, is not to be applied woodenly. An appellate court has the power to reconsider issues that have been previously decided and will do so if such a course is warranted by "considerations of substantial justice." *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659, 662-663 (5th Cir. 1974), *cert. denied,* 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). This case does not involve a previous remand to the district court or "panel shopping" by any of the parties. It involves an unpublished interlocutory order allowing an appeal to go forward where the basis of the order has been eliminated by subsequent events.[16] It would be ironic to allow the Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case. Under these circumstances, it is appropriate to once again examine the request for intervention.

A party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the standing necessary to initiate the lawsuit. *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Nevertheless, a party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an "appealable interest." Shapiro, *Some Thoughts*

16. Under Ninth Circuit Rule 21, the unpublished order allowing intervention is not regarded as precedent but is relevant to the law of the case. Whether it should stand as the law of the case is the very question we determine. The order itself required the appeal to be heard by this panel in conjunction with the appeal in the residency case and thus necessarily contemplated that this panel would dispose of both cases in the appropriate manner. Such a disposition includes a determination of the proper law of the case. Under these circumstances, there is no requirement that reconsideration of the order allowing intervention be done *en banc.* Cf. *Chabot v. National Securities and Research Corporation,* 290 F.2d 657, 659 (2dCir. 1961).

on Intervention Before Courts, Agencies and Arbitrators, 81 Harvard Law Rev. 721, 753-754 (1968). Resolution of this question turns on traditional standing analysis. *Norman's on the Waterfront, Inc. v. Wheatley,* 444 F.2d 1011, 1013-1014 (3rd Cir. 1971). Mere interest in the establishment of a legal precedent is not sufficient. *Boston Tow Boat Co. v. United States,* 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975 (1944). With these considerations in mind, we turn to the question of whether the Yellen group had an interest in this litigation that would permit them to intervene for the purpose of taking an appeal from the judgment of the district court.

In support of their motion for permission to intervene, the Yellen group asserted that they resided within the boundaries of the Imperial Irrigation District, that most of them were farm workers, that none owned farm land anywhere in the United States, and that they desired to purchase "excess lands" irrigated with water delivered by the federal reclamation project. These excess lands would be the private lands that would have been sold under the provisions of Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, had the government prevailed in the litigation. They further alleged that they were within the class of beneficiaries of the reclamation laws that were the focus of the lawsuit.[17] Read, as it must be, in the light of the government's complaint, their interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46.

This Court has only recently extensively reviewed the purposes behind Section 46. That Section was adopted to achieve broad antimonopoly and antispeculation purposes "conceived by Congress to be of importance to society as a whole." *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1121 (9th Cir. 1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571. We specifically noted also that

17. They also alleged an interest because of their prosecution of the residency case. In light of our disposition in that action, we do not consider whether this is an interest that would support intervention.

"Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale." *Id.* The history of the reclamation laws confirms that one of their primary purposes was the establishment of a large number of family-size farms. *Id.* at 1119, 1122. See generally, Taylor, *The Excess Land Laws: Execution of a Public Policy,* 64 Yale L.J. 477, 481-489 (1961). In this case, the district court found that there were approximately 800 owners of irrigable land in the Imperial Irrigation District whose holdings totalled over 160 acres and that the aggregate landholdings of this group were approximately 233,000 acres.[18] Sale of any of these holdings in excess of 160 acres in accord with Section 46 would make family-size farms available for purchase in the Imperial Valley at prices below current market prices.[19]

The injury that the Yellen group is asserting in this case is not merely the high cost of land. More precisely, they assert that in order to buy irrigable farm land in the Imperial Valley they must pay prices higher than they would have to pay if Section 46 applied to the private landowners in the area. The Yellen group suffers from this injury no matter which parcel of land is desired for purchase. The fact that it cannot be specifically measured in dollar amounts at this time does not change the fact that, under the formula established in *United States v. Tulare Lake Canal Co., supra,* the sale price of parcels of irrigable farm land in the Imperial Valley will definitely be reduced if Section 46 were to be applied as the United States originally contended when this action was filed.

This injury stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any

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18. *United States v. Imperial Irrigation District, supra,* 322 F.Supp. at 12.

19. For a description of the method for determining the sale price, see *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1113 n. 74, 1144.

landowner would sell any land at prices substantially below current market prices.

Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price.

It is important to emphasize the difference between the interest and injury involved in this case and the situations in the residency case and the *Bowker* case where the plaintiffs were found to lack standing. In the residency case, the plaintiffs sought a court order that would not, except in a very speculative sense, lead to the availability of farm land at an undefinable price which the plaintiffs could allegedly afford. In contrast, the interest asserted here is much more limited. It is an interest only in reducing land prices, not an interest in reducing land prices to any specific level, and unlike the residency case it is an interest that can be satisfied by an appropriate court order and without the need to depend on the uncertain actions of non-parties to the action and the uncertain responses of the market for agricultural land. In the *Bowker* case, the plaintiffs sought only to force landowners in another area to sell their land at prices determined by the application of Section 46. They did not desire to purchase this land, even if the price were to be reduced, and those plaintiffs were therefore not injured by higher land prices. In contrast, the group attempting to intervene and prosecute the appeal herein desires to take

advantage of a certain reduction in land prices and purchase land at those reduced prices.

In its order denying the Yellen group leave to intervene, the district court noted that the potential intervenors had not demonstrated a present ability to purchase the lands they desired. The district court also noted that the requirement for recordable contracts was not inconsistent with the usual right of a seller to choose his purchaser and that there would quite likely be a large group of people with veteran's preferences for the purchase of excess lands that would have a better chance than the Yellen group to purchase excess land created by the enforcement of Section 46.[20] However, the standing test of Article III does not require that the Yellen group show with certainty that they will be able to purchase the excess lands should they prevail on the merits of this appeal. The Yellen group occupies a position similar to that of the developer in *Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra.* The relief sought by the developer would not guarantee that its project would be built, for further problems with financing or construction, unrelated to the subject of the lawsuit, might interfere with its building plans. Such speculation, however, could not diminish from the fact that the relief sought was necessary if construction were to take place and that the developer had the requisite stake in the lawsuit. 45 U.S.L.W. at 4076. Similarly, in this case the likelihood that other factors may interfere with the intervenors' desires to purchase land cannot change the fact that land will never be available at below current market prices unless Section 46 is held to be applicable and that the intervenors thus have the necessary stake in the outcome of the lawsuit to confer standing to prosecute this appeal.[21]

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20. We express no opinion on the validity of these propositions.

21. See also *National Association of Neighborhood Health Centers, Inc. v. Mathews,* 179 U.S. App.D.C. 135, 551 F.2d 321 (D.C.Cir. 1976). There, an organization of community mental health centers sought to appeal a district court order concerning the transfer of federal funds by certain states from outpatient aid programs to hospital aid programs. Return of the funds to the outpatient aid program would not have meant that the plaintiff organization's members in those states would then have received the funding grants under the outpatient aid program. However, return of the funds would have benefited these members because it would create a larger pool of funds available for outpatient programs. This enhancement of the prospect of funding was held to be "substantial relief" sufficient to establish standing to challenge the district court's order concerning the transfer of funds. *Id.* at 329. Similarly, in this case, the intervenors' opportunity to obtain significantly lower land prices would be substantially enhanced by an appropriate court order. In the residency case, however, our previous discussion has pointed out that there is no substantial certainty that the opportunity of the plaintiffs therein for obtaining the relief sought in that case would be enhanced by an appropriate court order.

Finally, it must be determined whether the Yellen group has an interest sufficiently within the "zone of interests" protected by Section 46 which is different from the interest of a taxpayer or member of the general public and which satisfies the non-constitutional test for standing of *Data Processing Serv. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1969).[22] From our previous summary of the purposes behind Section 46, derived from *United States v. Tulare Lake Canal Co., supra,* it would appear that a non-landowning resident of an area where agriculture is feasible only because of a federal irrigation project who desires to purchase agricultural land and become a farmer is a particular "beneficiary" of Section 46 distinct from the general public and falls within the statute's "zone of interests."

The Yellen group thus has an interest under Rule 24(a)(2) which it may pursue on appeal.[23] Accordingly, we

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22. See footnotes 9 and 12, *supra.*

23. The district court discussed other reasons for denying intervention. First, it held that a previous proceeding in the California courts precluded the applicants for intervention from further litigating the acreage limitation question. We consider this problem in Section III, *infra.* The district court also decided that the Yellen group's interest was too speculative and remote to support intervention, because its decision on the merits would first have

reaffirm the previous order granting intervention and validating the protective notice of appeal, and we proceed to consider the merits of the case.

III. Res Judicata.

After the United States and the Imperial Irrigation District entered into the contract for the repayment of construction costs for the All-American Canal, the District initiated a confirmation action in the Superior Court of California for Imperial County. This action, entitled *Hewes v. All Persons,* resulted in a 1933 judgment that the landowners[24] claim is *res judicata* as to the contention that acreage limitations apply to privately owned lands in the Imperial Irrigation District.

In 1933, California law allowed an irrigation district to submit a contract for cooperation with the United States to a superior court for a validation proceeding.[25] Pursuant

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to be reversed on appeal. However, that was the very result that the Yellen group sought. The district court also felt that the necessity for further proceedings to determine the value of lands to be disposed and a plan for disposition made the possibility of relief even more remote. The length of time, however, before lands become available does not diminish the interest of the applicants for intervention. Finally, the district court noted that the United States had vigorously represented the interests of the Yellen group throughout the litigation. However, the decision of the government not to appeal meant that those interests were no longer being adequately represented.

24. Appellees in this case are the Imperial Irrigation District, named as a defendant below, landowners in the District owning more than 160 acres of irrigable land (appearing on behalf of themselves and the class of landowners owning excess lands) who were allowed to intervene by the district court, and the State of California which was also allowed to intervene below. Not all of the appellees have raised the same arguments in support of the judgment but none have taken positions that contradict the arguments of another appellee. The briefs of the landowner intervenors are the most comprehensive. Consequently, for the sake of convenience, all the appellees will be referred to throughout the remainder of this opinion as landowners.

25. 1897 Cal.Stat. c. 189, p. 276 § 68; 1917 Cal.Stat. c. 160, p. 243 § 3. See Cal.Water Code §§ 22670-22671, 23225.

to Article 31 of its contract with the United States, the District was required to institute a judicial confirmation proceeding, and the *Hewes* action was designed to satisfy that requirement.[26] The validity of the contract was challenged on grounds not relevant here by landowners in the Coachella Valley. At the same time, a landowner in the Imperial Valley named Charles Malan instituted another action entitled *Malan v. Imperial Irrigation District.* The *Malan* action raised a number of objections to the contract. One of those objections was that Malan, as an owner of more than 160 acres, would be deprived of delivery of water for his excess lands by the reclamation law if the contract was confirmed. The District took the position that this objection was meritless as the acreage limitation provisions did not apply under the terms of the Project Act. The District even went so far as to solicit a letter from the Secretary of the Interior to support their position in the *Malan* litigation.[27]

The *Malan* case was considered along with the *Hewes* confirmation proceeding. The superior court found that the contract would not limit the delivery of water to excess lands, concluded that no acreage limitations were made applicable to private lands by the contract and specifically stated that Section 5 of the Reclamation Act of 1902 did not apply in the Imperial Valley.[28] The judgment of the superior court became final in 1934 when appeals from that

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26. No such requirement was contained in the Project Act. The parties dispute whether the requirement was placed in the contract because of provisions for a confirmation proceeding in Section 46, Section 1 of the Act of May 15, 1922, 43 U.S.C. § 511, or merely because of California law. We deem it unnecessary to decide the source of authority for the contract provision for a judicial confirmation proceeding. The relevant issue is the *res judicata* effect to be given a judgment actually rendered by a California court in a confirmation proceeding.

27. See part VI of this opinion.

28. Although partially denominated a finding of fact, it is clear that all of the essentials of the decision on the acreage limitation issue were legal conclusions.

judgment to the California Supreme Court were dismissed by the parties.[29]

The United States was not a party in the *Hewes* and *Malan* actions, and the landowners did not raise a *res judicata* defense against the United States in the district court proceedings in the present case. The intervenors claim that such a defense cannot be raised against the United States and therefore cannot be raised against them because they are only asserting claims originally raised by the government. However, as discussed previously, the interests of an intervenor appealing a judgment are not necessarily identical with the interests of a non-appealing party which originally instituted the action. The intervenors' interests in this case are their own private interests and not the public interests represented by the government. Accordingly, we must determine whether the intervenors are barred by *res judicata* from litigating the acreage limitation question.

Under California law, a confirmation proceeding involving an irrigation district contract with the United States is considered an *in rem* proceeding. It is brought against all persons claiming an interest in the formation of the irrigation district, the operation of the contract, and the lands affected by the contract. A final judgment in a confirmation proceeding "will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large." *Ivanhoe Irrigation District v. All Parties & Persons,* 47 Cal.2d 597, 606, 306 P.2d 824, 829 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken,*

29. While the appeal was pending, the Bureau of Reclamation sent a letter to the Coachella Valley water district to the effect that unless it dismissed its appeal, the Bureau would make plans for the All-American Canal that would not include a capacity to deliver water to the Coachella Valley. While the reasons for the dismissal of the Coachella appeal are not in the record, it should be noted that shortly thereafter the Coachella appeal was in fact dismissed and a separate contract for the Coachella Valley was negotiated with the United States. The record also includes a letter from Malan's attorney complaining about pressure to drop the appeal, but the record does not contain anything to explain why Malan's appeal was dismissed.

357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). Phrased another way, "[w]ithin its legitimate issues it will be binding on the world at large." *Santa Barbara County Water Agency v. All Persons & Parties,* 47 Cal.2d 699, 703, 306 P.3d 875, 873 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra.*

It therefore becomes necessary to determine what the "pertinent" or "legitimate" issues are in a confirmation proceeding, because the California courts will recognize the confirmation proceeding judgment as *res judicata* only as to those issues to which the judgment "properly relates". This question was answered in the *Ivanhoe* proceedings in opinions of the California Supreme Court both before and after the Supreme Court decision on other aspects of the case. "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons, supra,* 47 Cal.2d at 607, 306 P.2d at 829, such a judgment determines questions necessarily incident to such a determination. *Id.* However, "the only issue involved is the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 699, 3 Cal.P.ptr. 317, 320, 350 P.2d 69, 72 (1960) (Emphasis supplied.)

For purposes of this case, therefore, we start with the proposition that the *Hewes* judgment establishes the validity of the contract. That portion of the *Hewes* decision dealing with the acreage limitations of the reclamation law, however, is not essential to a determination that the contract was valid. A decision that the Project Act incorporates the acreage limitations on private lands of the reclamation law into the contract would not make the contract invalid under federal law, *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), or California law. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).[30] A decision that the Project Act does not in-

30. While this case interpreted Cal. Water Code §§ 23197, 23200, which were enacted in 1943, those statutes are essentially the same as earlier California statutes to the same effect that were applicable when the Imperial Irrigation District contract was made. See 1917 Cal.Stat. c. 160, pps. 244, 245, §§ 2, 4.

corporate the acreage limitations is a decision that Congress exempted the project from application of those limitations and would not make the contract invalid under federal or California law. The decision that acreage limitations did not apply under the contract was therefore irrelevant to the only question properly before the court in the confirmation proceeding — the validity of the contract — and it is pure dicta. Cf. *Stanson v. Mott*, 17 Cal.3d 206, 212, 130 Cal.Rptr. 697, 701, 551 P.2d 1 (1976).

The federal courts are bound to give the *Hewes* judgment the "same full faith and credit" it would be given by the courts of California. *Neale v. Goldberg*, 525 F.2d 332 (9th Cir. 1975). The determination of the *Hewes* court that acreage limitations did not apply in the Imperial Irrigation District was not a determination which is "properly related" to the purpose of the confirmation proceeding because decison of that issue one way or another cannot affect the validity of the contract under federal or California law. The determination of the acreage limitation issue by the *Hewes* court was an interpretation of the terms of the contract that the court was not entitled to make in a confirmation proceeding. Cf. *Ivanhoe Irrigation District v. All Parties and Persons, supra*, 53 Cal.2d at 727-728, 3 Cal.Rptr. at 338, 350 P.2d at 90. While the acreage limitation was litigated in the confirmation proceeding, that issue was incidental and collateral to the judgment rendered therein. The judgment in the confirmation proceeding cannot foreclose consideration of the acreage limitation issue in the present case. *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1898 (9th Cir. 1977).[31]

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31. We therefore need not determine whether intervenors were interested parties in the *Hewes* litigation such that they were bound by the determination of the acreage limitation issue when neither of the parties litigating that issue wished to see the acreage limitations apply in the Imperial Valley, *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 720-721 (5th Cir. 1975), *reh. den.*, 514 F.2d 1072 (1975), or whether important policy considerations mandate the inapplicability of *res judicata* principles in litigation of the acreage limitation question.

IV. Statutory Construction.

The enactment of the Boulder Canyon Project Act was not due solely to the problems of the Imperial Valley. A canal to the Valley running entirely within the United States had been desired for many years, and the District, unable to construct the necessary facilities with its own resources, had turned to Congress for assistance. In addition, however, the Project Act was the outgrowth of extensive concerns of the seven Colorado River Basin states over allocation of river water on an equitable basis, the control of flooding, and the more productive use of the water. Moreover, international considerations were involved because of Mexico's interest in the Colorado River. The history of the Project Act summarized in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), need not be repeated here. See also *Arizona Power Authority v. Morton*, 549 F.2d 1231, 1233-1234 (9th Cir. 1977). For present purposes, it is sufficient to say that Congress recognized that the problems could not be handled on a local or even state-by-state basis, and that the matter had become a pressing national concern.

At the same time as the concerns and proposals culminating in the passage of the Project Act had been occupying the attention of Congress, various revisions of the general reclamation laws, culminating in Section 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 12 of the Project Act defined the term "reclamation law" to include the Reclamation Act of 1902 "and the Acts amendatory thereof and supplemental thereto," 43 U.S.C. § 617k, and Section 46 would be included in that definition. Section 14 of the Project Act stated that the Act was a "supplement" to the reclamation law. 43 U.S.C. § 617m. By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws, including Section 46, that had recently been considered by Congress and that had also been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of "a main canal and appurtenant structures located entirely within the United States" to deliver water

from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, Section 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), mandates that reimbursement be secured by the Secretary of the Interior:

> by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

Section 14 of the Project Act reinforces the command of Section 4(b) by providing that the "reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explicitly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1929. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in Section 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of Section 46 apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

The excess land provisions are an important cornerstone of the reclamation laws.[32] Congress has exempted some

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32. One treatise has commented that "[a]creage limitation is, in every respect, the most important part of reclamation law." 2 *Waters and Water Rights,* § 120 at p. 209 (1967).

projects from the operation of these provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1958).[33] In the face of language directly mandating application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District, and in the absence of any language in the Project Act that is comparable to the example of a specific exemption used by the Supreme Court in the *Ivanhoe* case, the landowners nevertheless argue that various portions of the Project Act necessarily operate to create such an exemption. It is to these contentions that we now turn.

Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. *Arizona v. California, supra,* 373 U.S. at 580, 83 S.Ct. at 1487. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." *Id.* at 584, 83 S.Ct. at 1489; 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."[34] The term "present perfected rights" from

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33. Although referring to Section 5 of the Reclamation Act of 1902, this statement applies equally well to the excess land provision of Section 46 of the Omnibus Adjustment Act of 1926. The very example of a specific exemption used by the Supreme Court in fact referred specifically only to Section 46. See 68 Stat. 1190.

34. Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong.Rec. 324 (1928).

the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. *Arizona v. California, supra,* 373 U.S. at 566, 83 S.Ct. 1468.[35]

The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. It is the landowners' position that the qualifying clause of Section 14 "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.[36]

A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. *Arizona v. California,* 376

35. The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona v. California, supra,* 373 U.S. at 566, 83 S.Ct. at 1480.

36. This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

U.S. 340, 341, 84 S.Ct. 755, 756, 11 L.Ed.2d 757 (1964).[37] In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law.[38] Examination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in *Arizona v. California, supra,* 376 U.S. 351-352, 83 S.Ct. 1468, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. *Merchants National Bank of San Diego v. Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904).[39] The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, *Id.* These principles of ownership have been specific-

37. As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona v. California, supra,* 373 U.S. at 586-587, 83 S.Ct. 1468, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

38. It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote 36, *supra.*

39. Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

ally applied to the Imperial Irrigation District. *Hall v. Superior Court,* 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield,* 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. *Madera Irrigation District v. All Persons, supra,* 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular

amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

The landowners next argue that the overall scheme of the Boulder Canyon Project Act is inconsistent with Section 46.[40] They point out that Section 46 combines a variety of provisions while the Project Act is composed of different sections dealing separately with different subjects. In itself, this hardly makes the two statutes incompatible. Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), required the Secretary of the Interior to make provisions for reimbursement revenues before money was appropriated or construction began on the Canal, while Section 46 permits execution of a repayment contract upon completion of the project but before commencement of water deliveries. In this respect, the Project Act's modification of Section 46 deals only with the time for securing repayment and does

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40. This argument would apply to all water deliveries through the All-American Canal, including delivery to the Coachella Valley. Cf. footnote 36, *supra.*

not mean that all other substantive provisions of Section 46 are incompatible with the Project Act. [41]

The landowners point out that Sections 1 and 4(b) of the Project Act require reimbursement only for the capital costs of the "main canal and appurtenant structures to connect the Laguna Dam" while exempting users in the Imperial Valley from repayment obligations for the costs of water storage facilities. 43 U.S.C. §§ 617, 617c(b). Nevertheless, the Project Act still required reimbursement of substantial sums of money. This partial relaxation of Section 46's requirement of reimbursement of the capital costs of all project works does not make the other provisions of Section 46 inapplicable. The landowners also note that Section 46 requires a contract while Section 4(b) of the Project Act requires the Secretary to insure repayment "by contract or otherwise." Whatever might be the case if the Secretary had "otherwise" insured repayment, the method chosen in the case of the Imperial Valley was a contract.[42]

The landowners further argue that Section 5 of the Project Act, 43 U.S.C. § 617d, prescribes conditions to govern water delivery contracts and that this Section requires the contracts to conform to Section 4(a) of the Project Act, 43 U.S.C. § 617c(a). They then argue that Section 4(a) contemplates the unconditional delivery of water to satisfy present perfected rights and says nothing about conforming to the reclamation laws. Sections 1 and 4(b) of the Project Act, they argue, contain references to reimbursement "as provided in reclamation law", but the landowners argue

41. Similarly, we attach no significance in this context to the fact that Section 2(a) of the Project Act, 43 U.S.C. § 617a(a), establishes a special fund, the Colorado River Dam Fund, that is not envisioned by Section 46 and that is to receive all payments made for projects constructed pursuant to the Act.

42. The landowners fail to note that if the Secretary "otherwise" insures repayment, Section 4(b) still requires that it be done "in the manner provided in the reclamation law" and that at the time the contract was made there was no means authorized by the reclamation law, other than the type of contract involved here, for insuring repayment.

that these provisions are distinct from the provisions governing the delivery of water in Sections 4(a) and 5. They argue that it would be logical to place a condition that the delivery of water be subject to the reclamation laws in the section of the Project Act specifically governing such deliveries and that the failure to place such a condition in that section (and specifically placing such a condition in another section of the Project Act) means that there is no such condition on deliveries under Section 5.

This argument overlooks the fact Section 4(a) deals with interstate allocations of water and that conditions on the Secretary's authority under Section 5 are also contained in other sections of the Project Act. For example, Section 6, as previously urged by the landowners, is a significant limitation upon the authority conferred by Section 5. Similarly, as discussed previously, Section 14 is also a significant limitation. The Section 4(a) limitation specifically incorporated into Section 5 is no stronger than the Section 6 limitation that is not specifically referred to in Section 5, and, as held earlier, the Section 6 limitation is not incompatible with the application of the excess lands provision of Section 46.

The landowners' [sic] next argue that Section 14 of the Project Act applies, by its terms, only to the "construction, operation, and management" of project works and not to the delivery of water. They claim that these terms refer only to the business and fiscal aspects of the project and not to matters of "social control" such as acreage limitations. They claim their argument is bolstered by the fact that the Project Act employs language in other sections that distinguishes between "construction, operation, and maintenance" and "delivery" of water.[43] This argument overlooks the

43. Compare Section 10, 43 U.S.C. § 617i, with Section 5, 43 U.S.C. § 617d, and Section 1, 43 U.S.C. § 617, with Section 4(b), 43 U.S.C. § 617c(b). See also Section 7, 43 U.S.C. § 617f. However, Section 8(b), 43 U.S.C. § 617g(b), appears to include delivery and use of water within the activities of construction, operation, and management. This argument would apply to all water deliveries through the All-American Canal. See footnotes 36, 40, *supra*.

fact that the contracts with irrigation districts required by Section 46 are themselves only for the reimbursement of the "cost of constructing, operating, and maintaining the works during the time they are in control of the United States" and that the Section 46 contracts with the irrigation districts are not for delivery of water. The requirement that excess lands shall not receive water is a condition, basic to achieving a central purpose of the reclamation laws, to be incorporated into a Section 46 contract with an irrigation district for "construction, operation, and maintenance" of a project. Under the Project Act, Imperial Valley landowners were only required to reimburse the United States for the "construction, operation, and management" expenses connected with the All-American Canal. They were not to be charged for any portion of the construction of Boulder Dam (the main storage dam) or for the use or delivery of the water. It was natural, therefore to have separate provisions dealing with the delivery of water, where no reimbursement was required, and with the construction of the Canal where reimbursement was required. With regard to the latter, as has previously been discussed, not only Section 14 but Sections 1 and 4(b) of the Project Act mandate application of Section 46 to reimbursement contracts. In this context, any differentiation in Project Act provisions for delivery of water and construction of the Canal is nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Act but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law and Section 46.

The final statutory construction argument asserted by the landowners is based on Section 9 of the Project Act which provides for the disposition of public lands that could be practically irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h. This Section directed the Secretary to withdraw these public lands from entry and authorized re-opening them to entry at a later date. Lands subsequently opened for entry were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. Section 9 also granted

an exclusive entry preference to veterans for a period of three months, subject to the qualifications requirements of 43 U.S.C. § 433. The landowners argue that the references in Section 9 to other statutes would not have been necessary if Section 14 of the Project Act generally incorporated the reclamation laws into the Act. They then argue that the specific references to other statutes in the Section of the Project Act dealing with public lands and the absence of any specific provisions dealing with excess private lands means that the excess lands provisions of Section 46 cannot apply to private lands benefiting from the Act.

The landowners are reading too much significance into Section 9's references to other statutes. The reference to a 160-acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, Section 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law" — a general reference to reclamation law similar to the general reference in Section 14. Similarly, the exclusive preference given to veterans by Section 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,[44] so this preference had to be qualified by a specific reference to 43 U.S.C. § 433. To use these two minor qualifications by reference in Section 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing those laws, the specific incorporation of reclamation law in Section 14 of the Act, and the lack of any specific exemption from the operation of the excess land laws in the Project Act puts a far too strained reading on Section 9 which cannot be accepted.

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44. The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 186. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787.)

V. Legislative History.

A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measures that ultimately became the Project Act, the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.

The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress.[45] A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, redrafted, and re-introduced as H.R. 9826. As redrafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley.[46]

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45. The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

46. While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.*, 13 Natural Resources Journal 1, 4 (1963).

At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i. e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract.[47]

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.[48] Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive.[49] It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's

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47. Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pps. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

48. Act of February 21, 1911, ch. 141, 36 Stat. 925.

49. Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."[50] During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.[51] Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the

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50. Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

51. 68 Cong.Rec. 4291-4292 (February 21, 1927).

meantime, a Senate bill, S. 728, sponsored by Senator Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.[52]

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irri-

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52. Senate report No. 592, 70th Cong., 1st Sess. (1928) at pps. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id., Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

gation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill.[53] This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928, Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."[54] The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is noteworthy that at this time Senator Hayden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.[55]

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres.[56] However, he made only a brief passing reference to the issue in a speech opposing the bill

53. 69 Cong.Rec. 7634-7635 (May 2, 1928). See also 69 Cong.Rec. 9451 (May 22, 1928).

54. 70 Cong.Rec. 67 (December 5, 1928).

55. 70 Cong.Rec. 71, 81 (December 5, 1928).

56. 70 Cong.Rec. 289 (December 8, 1928).

that extended over some 32 pages in the Congressional Record.[57] During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.[58] Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to

57. 70 Cong.Rec. 277-298, 314-323 (December 8 and 10, 1928).

58. The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong.Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong.Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a Congressional committee.[59] Similarly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. *United States v. Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.E.2d 590 (1962). Cf. *National Automatic Laundry and Cleaning Council v. Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C.Cir. 1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponent's statements correctly indicate the views of the bill's proponents, *Arizona v. California, supra,* 373 U.S. at 583 n. 85, 83 S.Ct.

59. To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as inadequate for reasons unrelated to the acreage limitation provision.

1468. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 n. 24, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be less of a need to find a specific exemption for the Imperial Valley in the legislative history.[60]

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previous [sic] unproductive and lands previous productive bec. ıse irrigated by non-federal projects. Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question

60. The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

> It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.

Id. at 1143.

VI. Administrative Practice.

The landowners next claim that the actual practice of the Department of the Interior supports their position. Relying on both a legal interpretation favorable to their position and the lack of Department enforcement of the excess lands provisions of Section 46, they argue that this administrative practice is entitled to great, if not conclusive, weight in the statutory construction of the Project Act, has been ratified by Congress, and has been relied upon to such an extent that it cannot now be changed.

The legal interpretation upon which the landowners rely is a letter from Ray Lyman Wilbur, Secretary of the Interior, to the Imperial Irrigation District dated February 24, 1933.[61] It is important to examine this letter carefully before evaluating the landowner's claims.

The letter begins by referring to the then-pending suit of *Malan v. Imperial Irrigation District* and the allegation therein that, under the reclamation law, water cannot be delivered from the All-American Canal to any landowner owning more than 160 acres of land. Secretary Wilbur states that the allegation in the *Malan* litigation is an in-

61. The letter is reprinted as Appendix E to Opinion M-36675. Applicability of the Excess Land Laws [to]) Imperial Irrigation District Lands, 71 I.D. 496, 529 (1964) (hereinafter referred to as the Barry opinion.)

accurate statement of the reclamation law but that the allegation presumably refers to Section 5 of the Reclamation Act of 1902. The Wilbur letter asserts that Section 5 provides that no water shall be *sold* except under certain conditions but does not provide that no water shall be *delivered* from a canal constructed by the government and that the Project Act and the contract with the Imperial Irrigation District do not concern the sale of water and further provide that there will be no charge for the delivery of water.

This portion of the Wilbur letter, whether legally correct or not,[62] is irrelevant to the present case. It concerns only the applicability of Section 5 of the Reclamation Act of 1902. It does not purport in any way to consider Section 46 of the Omnibus Adjustment Act of 1926. The reasoning of this section of the Wilbur letter cannot apply to Section 46 because that statute does not speak in terms of the sale of water.

The next portion of the Wilbur letter states that the question of the application of the 160-acre limitation had been carefully reviewed and the conclusion had been reached that the limitation did not apply to lands "now cultivated and having a present water right."[63] This conclusion is then justified by the argument that Congress recognized that lands in the Imperial Valley had vested water rights when it provided that there be no charge for storage, use, or delivery of water and that previous decisions of the Bureau of Reclamation had held that Section 5 of the Reclamation Act of 1902 did not prevent recognition of vested water rights for areas larger than 160 acres and that it permitted continued delivery of water to satisfy vested water rights in single ownerships larger than 160 acres.[64]

62. The landowners advance this argument to justify reversal of Judge Murray's decision in the residency case. Judge Murray had rejected such an argument. *Yellen v. Hickel, supra,* 352 F.Supp. at 1305-1306.

63. 71 I.D. at 530.

64. Intertwined with this argument is the assertion, previously discussed, that Section 5 of the Reclamation Act of 1902 cannot apply because no sale of water is involved.

While this second argument is directed only at Section 5 of the Reclamation Act of 1902 and never mentions Section 46 of the Omnibus Adjustment Act of 1926, a variation of that argument with respect to Section 46 has been asserted as one of the landowners' main arguments, i.e., that the recognition of "present perfected rights" by the Project Act is incompatible with the application of the excess lands provision of Section 46. Significantly, however, the Wilbur letter makes no mention of the other landowners' assertions concerning the purported inconsistencies between the Project Act's reimbursement provisions and Section 46, the inapplicability of the excess lands provision of Section 46 because of the restricted incorporation of reclamation law by Section 14 of the Project Act, and the inapplicability of Section 46 by implication because of the public lands provisions of Section 9 of the Project Act. As to these arguments, the Wilbur letter, no matter how convincing or dubious its reasoning, can provide absolutely no support.

This letter cannot be given the weight the landowners seek. The letter was written after the Department of the Interior contracted with the Imperial Irrigation District. There is no evidence that the Department reached a conclusion before entering into the contract that the 160-acre limitation did not apply in the Imperial Valley. After a search by the Department, the only positive evidence that was uncovered on this question was that before the execution of the contract the Department had actually taken the position that the excess land laws would apply in the Imperial Valley.[65] The Wilbur letter was in response to a request for a ruling by the Imperial Irrigation District, which hoped to receive a formal ruling that acreage limitations did not apply but did not want a formal ruling if the conclusion came out the other way.[66] No formal opinion on this issue was prepared by the Solicitor of the Department at that time.[67]

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65. 71 I.D. at 509 n. 25.

66. *Id.*

67. After the Wilbur letter was issued, representatives of the Imperial Irrigation District expressed concern that the letter did not discuss *(Footnote continued on next page.)*

Doubts as to the legal validity of the Wilbur letter arose within the Department in 1944. The Coachella Valley in California also received water through the All-American Canal. The original contract with the water district in that Valley contained no specific provisions for enforcement of the excess land laws. During negotiations for a supplemental Coachella contract, the Bureau of Reclamation, believing that the acreage limitations applied, requested a formal ruling from the Solicitor.[68] The resulting opinion of Solicitor Fowler Harper, approved by the Secretary of the Interior in 1945, determined that the excess land provisions of the reclamation laws applied in the Coachella Valley and that nothing in the Boulder Canyon Project Act precluded their application to that Valley. The Harper opinion criticized the Wilbur letter as an informal decision designed to help the Imperial Irrigation District in the litigation then pending in state court concerning the validity of the District's contract. However, the Harper opinion did not directly overrule the Wilbur letter. Instead the Wilbur letter was distinguished on the basis that it applied only to the Imperial Valley and did not cover the Coachella Valley.[69]

After the Harper opinion was issued, the Veterans of Foreign Wars inquired in 1948 about the inconsistency of application of the 160-acre limitation in the Imperial and Coachella Valleys. The Secretary of the Interior at that time, Julius A. Krug, responded in a letter which did not

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the applicability of Section 46 of the Omnibus Adjustment Act of 1926. A letter from Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, to the Bureau's Regional Counsel in Los Angeles, dated March 1, 1933, took the position that the same principle discussed in the Wilbur letter with respect to Section 5 of the Reclamation Act of 1902 applied to Section 46. See Appendix F to the Barry opinion. 71 I.D. at 531-532. There is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer.

68. 71 I.D. at 514.

69. Solicitor's Opinion. M-33902 (May 31, 1945), found as Appendix H to the Barry opinion, 71 I.D. at 533-548.

attempt to legally justify or explain any inconsistencies between the Harper opinion and the Wilbur letter. Instead, Krug justified the non-application of the 160-acre limitation in the Imperial Valley on the ground that owners and subsequent purchasers of land in the Imperial Valley were entitled to rely upon the Wilbur letter and it would be unfair to change the situation even though the legal validity of the conclusions in the Wilbur letter might be questionable.[70]

In 1958, the question of the application of the 160-acre limitation in the Imperial Valley arose in proceedings before the special master appointed by the Supreme Court in the *Arizona v. California* litigation. The special master requested memoranda on the question and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply doubted that the acreage limitation question was relevant to the issues before the special master. Bennett's reply also came to essentially the same conclusion reached by Secretary Krug in 1948. Without undertaking any legal analysis of the issue, he concluded that water had been delivered pursuant to the contract since the early 1940's, that no legal challenge to the contract had been raised since the state court confirmation proceedings, that no administrative action had ever been taken to enforce the acreage limitation, and that it was no longer realistic and practicable to enforce that law even if it should have been enforced. The Solicitor General then filed a memorandum with the special master taking the position that non-compliance with the acreage limitations was not relevant to the issues before the special master. In a footnote, however, the Solicitor General's memorandum concluded that the acreage limitations of the reclamation laws applied to privately owned lands in the Imperial Valley receiving water from the All-American Canal.[71]

The only legal analysis of the Department of the Interior, therefore, which supports the landowners' interpretation of

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70. 71 I.D. at 515.

71. 71 I.D. at 515-516.

the Project Act is the Wilbur letter of 1933. That letter does not purport to deal with the questions of interpretation raised in this case. The Department of the Interior itself began to have doubts about the legal soundness of the Wilbur letter's conclusions shortly after water deliveries through the All-American Canal began in the early 1940s but continued to adhere to the practice of nonenforcement of acreage limitations in the Imperial Valley because of its previous practice of nonenforcement. Finally, the legal validity of the conclusions in the Wilbur letter were specifically rejected by the Department of the Interior in 1964.

A thorough and comprehensive opinion by Solicitor Frank J. Barry was prepared in response to Congressional inquiries in 1961 and 1964.[72] The opinion specifically rejected the legal basis set forth in the Wilbur letter for concluding that Section 5 of the Reclamation Act of 1902 still permitted deliveries of water to excess lands that had vested water rights prior to the initiation of the reclamation project. The precedents cited in the Wilbur letter were actually special cases where the government acquired existing physical irrigation facilities for incorporation into a reclamation project and were not applicable in the Imperial Valley. The Barry opinion considered the language of the Project Act, its legislative history, the Wilbur letter and previous administrative practices and concluded that privately owned lands in the Imperial Irrigation District are subject to the excess land laws.

The landowners seek to elevate the legal conclusions reached in the Wilbur letter into the binding force of law. Without setting forth the facts in each of the cases upon which they rely, it suffices to say that such a proposition is far too broad. The appropriate deference to be accorded an administrative construction of a statute is that a "consistent and longstanding" interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to "considerable weight" but it does not control the decisions of the courts. *United States v. National*

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72. The Barry opinion, fn. 61, *supra*.

Association of Securities Dealers, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen,* 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

In the case of the Wilbur letter, there is an informal opinion reached under circumstances indicating a lack of careful consideration. It does not purport to even consider the portion of the reclamation law in question in this case. The legal conclusions of the Wilbur letter have not been consistently held to be correct by the Department of the Interior. Most if not all of its reasoning was implicitly rejected in the Harper opinion of 1945 and it was explicitly rejected in the Barry opinion of 1964. The Wilbur letter does not construe ambiguous or doubtful language in the Project Act but in a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered. In these circumstances, insofar as the application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 is concerned, the Wilbur letter is not entitled to any deference as a proper construction of the Project Act and reclamation law. Cf. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Shea v. Vialpando,* 416 U.S. 251, 262 n. 11, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); *Zuber v. Allen, supra,* 396 U.S. at 192-193, 90 S.Ct. 314; *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 n. 27, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977).

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced

before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.[73]

The landowners contend that the "consistent" administrative interpretation that the 160-acre limitation did not apply to private lands in the Imperial Valley was brought to the attention of Congress and that Congressional failure to object amounts to a Congressional ratification of the Wilbur interpretation of the Project Act. Such a sweeping claim fails to stand up in light of an analysis of what can actually be considered to have been brought to the attention of Congress and the manner in which this occurred.

Many of the references in committee hearings upon which the landowners rely are brief references to the situation in the Imperial Valley contained in lengthy considerations of completely different reclamation projects such as the San Luis or Central Valley Projects. The claim of an exemption from application of the acreage limitations to private lands in the Imperial Valley was often raised by advocates of exemptions in allegedly similar situations in attempts to persuade Congress to specifically place such an exemption in another reclamation project. Rejection, or even acceptance, of an exemption claim for another project hardly amounts to deliberate Congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley in government reports sent to various Congressional committees.

The best evidence the landowners can muster on this argument concerns the 1958 hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law.[74] The

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73. Administrative practice plainly contrary to the law may be overturned no matter how long standing. *Baltimore & Ohio R. Co. v. Jackson,* 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957); *United States v. E. I. duPont de Nemours & Co.,* 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).

74. *Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448,* Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess. (1958).

subcommittee was concerned with the future shape of the reclamation law in general and the application of acreage limitation provisions to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley and the Wilbur letter were brought to the subcommittee's attention. Counsel for the Imperial Irrigation District testified shortly after appearing before the Supreme Court in the *Ivanhoe Irrigation District v. McCracken* litigation. His testimony echoed the theory concerning vested water rights that was enunciated by the California Supreme Court in that series of cases and was later rejected by the Supreme Court. These circumstances cannot amount to Congressional ratification by silence of the Wilbur interpretation. Significantly, the chairman of the subcommittee, Senator Anderson, was the Senator who later initiated the Department of the Interior review that culminated in the Barry opinion rejecting the Wilbur interpretation.

The landowners seek to draw favorable implications from the fact that Congress took no action with respect to private lands in the Imperial Valley when in 1946 it amended Section 9 of the Project Act dealing with public lands and when it rejected an attempt by the Bureau of Reclamation to extend its control over operation of the project works. However, there is no evidence that the acreage limitation question was brought to the attention of Congress during its consideration of these other matters. For example, the 1946 amendment to Section 9 of the Project Act merely extended the veterans of World War II and to those who served in the Coast Guard.[75] Furthermore, in contrast with the Imperial Irrigation District's dispute with the Bureau of Reclamation that the landowners refer to, Congress took no action when the present dispute over application of the acreage limitations arose after the 1964 Barry opinion, so it could be argued, in terms of the landowners' frame of analysis, that Congress acquiesced in this new interpretation of the reclamation laws. We draw neither conclusion from Congressional inactivity. The point is

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75. See 1946 U.S.Code Congressional Service pp. 1080-1081.

that in the absence of specific indications that Congress actually considered this problem, the incidents relied upon by the landowners cannot support the finding of Congressional ratification that the landowners desire.

This conclusion is buttressed by consideration of the landowners final version of this argument, i. e., that with all this information on the situation in the Imperial Valley, the repeated appropriations from 1936 to 1950 for continuing construction on the All-American Canal amounts to a Congressional ratification of the administrative construction as it is viewed by the landowners. However, the reference relied upon by the landowners to show Congressional knowledge and consideration of the Wilbur letter do not date back earlier than 1944. There is no showing of Congressional knowledge and consideration, one way or the other, prior to that year. In addition, in 1944 the Harper opinion cast considerable doubt over the validity of the Wilbur interpretation even if it did not specifically reject it in the case of the Imperial Valley, and Congress may have been aware of the later Department of the Interior opinion. Furthermore, by 1944 the Imperial Valley had already been receiving all of its irrigation water through the All-American Canal for about two years. Presented with this situation and the Harper opinion, the following appropriations may just as well be considered solely as Congressional ratification of the application of acreage limitations in the Coachella Valley. As before, the record here is too sparse and ambiguous to justify a conclusion that Congress approved of the Wilbur construction of the Project Act and the reclamation laws.

The landowners claim that it would be unfair to enforce the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 because of individual landowners reliance on the Wilbur letter and the past non-enforcement of the 160-acre limitation. The landowners raise claims here based on broad generalizations that cannot apply under the facts of the case. There are many holdings of land in excess of the 160-acre limitation in the Imperial Irrigation District before the Wilbur letter was issued and these holdings could not have been acquired in reliance upon the assurances contained in that letter. In any event,

the questions of reliance and estoppel presented by the landowners' argument here are not germane to this lawsuit. In operation, Section 46 requires compensation to excess landholders for the value of their property and their improvements to their property. It only excludes the increase in the value of the land attributable to the federal project. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 113 n. 74, 1144.[76] Furthermore, assuming that any individual landowner can make out a claim to greater compensation based on estoppel or some other theory, compensation will be available, for if the enforcement of the conditions of Section 46 "impairs any compensable property rights, then recourse for just compensation is open in the courts." *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 291, 78 S.Ct. at 1183. Cf. *United States v. Union Oil Company of California,* 549 F.2d 1271, 1281 (9th Cir. 1977). The point is that the possibility that such compensation may be mandated cannot defeat compliance with the conditions of the reclamation laws.

In a variation on the reliance on administrative practice argument, the District relies on its contract with the United States. Article 30 of the contract paraphrases Section 14 of the Project Act. The Coachella Valley contract contains an identical section but, in addition, contains additional clauses dealing with the divestiture of excess lands. The District argues that these additional clauses would be superfluous if the section based on Section 14 of the Project Act was sufficient to incorporate Section 46. However, it should be remembered that after the Barry opinion was issued in

76. The District claims that the construction of the All-American Canal did not change the value of private lands in the District because the Canal only provided an alternate means of conveying irrigation water already supplied by non-federal enterprise. We doubt that this is the case. The location of the Canal entirely within American territory, a project the District was unable to undertake on its own, is, in itself, a significant benefit. The appraisal process takes into account the value, or lack thereof, of the federal project to the private lands. However, Section 46 would still apply because it was the intent of Congress to make small family farms the recipients of water delivered by federal reclamation projects.

1964 the District refused to agree to a supplemental contract with the United States that would govern the administration of the divestiture provisions of Section 46. From the discussion in Part IV, *supra,* it is clear that the general incorporation of the reclamation law in Section 14 of the Project Act that is carried over into the contract is sufficient to mandate application of Section 46.[77]

VII. Conclusion.

In No. 71-2124, the district court's order denying leave to intervene is reversed, the protective notice of appeal is validated, and the judgment is reversed. In Nos. 73-1333 and 73-1388, the judgment is vacated and the case is remanded with instructions to dismiss the complaint because of lack of standing.

Appendix to follow

77. For the reasons set out in Part IV of this opinion, the District's argument that separation of the contract provisions for delivery of water and for construction, operation, and maintenance of the Canal precludes application of Section 46 must also be rejected.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. IMPERIAL IRRIGATION DISTRICT, a corporation, *Appellee,* JOHN M. BRYANT, et al., *Appellees,* STATE OF CALIFORNIA, *Appellee.* BEN YELLEN, et al., *Appellants.*	No. 71-2124

[August 6, 1973]

Before: HASTIE,* MERRILL and ELY, Circuit Judges.

ORDER ALLOWING INTERVENTION

It appearing that the decision of the district court in this case, 322 F.Supp. 11 (S.D.Cal.1971) and a subsequent decision of another judge of the same court in *Yellen v. Hickel,* 335 F.Supp. 201 (S.D.Cal.1972) disclose conflicting rulings on questions of law that may significantly affect the course of economic development of the Imperial Valley of California; and it also appearing that an appeal to this court in

* Honorable William H. Hastie, Senior United States Circuit Judge, Third Circuit, sitting by designation.

Yellen v. Hickel is pending at our Nos. 73-1333 and 73-1388, but that the election of the United States, the unsuccessful plaintiff, not to take an appeal in the present case precludes appellate review unless the interested Imperial Valley landowners who are before us seeking to intervene are allowed to do so and to perfect and prosecute a protective appeal that they have noticed; and it further appearing that the order of the district court denying intervention, from which the interested landowners are now appealing, was made before the district court decision in *Yellen v. Hickel* and, therefore, that the district court could not anticipate the decisional conflict in the light of which this court now must act; and because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting final decisions on legal issues of public and private importance should both be in force in this circuit.

Now, therefore, it is ORDERED that the order of the district court denying the petition of the appellants to intervene in this cause is reversed, and intervention as prayed is allowed nunc pro tunc and the protective appeal noticed by the intervenors is validated.

It is further ORDERED that the Clerk shall in due course calendar this appeal and the appeal in *Yellen v. Hickel* for hearing on the same day before the same panel of this court.

The parties to this appeal shall be privileged to supplement their briefs and the record heretofore filed herein.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

IMPERIAL IRRIGATION DISTRICT, a corporation, Defendant-Appellee,

John M. Bryant et al.,
Defendants-Appellees,

State of California, Defendant-Appellee,

Ben Yellen et al., Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS et al.,
Defendants-Appellants.

Ben YELLEN et al., Plaintiffs-Appellees,

v.

Cecil D. ANDRUS et al.,
Defendants-Appellants,

W. L. Jacobs et al.,
Defendants-Appellants.

Nos. 71-2124, 73-1333 and 73-1388.

United States Court of Appeals,
Ninth Circuit.

April 23, 1979.

Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG*, District Judge.

WOLLENBERG, District Judge:

I. Rehearing and Rehearing In Banc

In petitioning for rehearing and rehearing in banc of the decision of this Court in No. 71-2124, filed August 18, 1977, appellees Imperial Irrigation District and John M. Bryant, et al., argue that standing of the Yellen group, intervenors-appellants herein, is predicated on the erroneous assumption that if Section 46 of the Omnibus Adjustment Act of 1926,[1] 43 U.S.C. 423e, were to be enforced, land in the Imperial Irrigation District would become available at below-market prices. Said appellees further argue that

* The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

1. In pertinent part, Section 46 provides that:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior.

the decision is internally inconsistent and is contrary to this Court's decisions in *Bowker v. Morton,* 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966).

Appellees take the position that even if the Court orders enforcement of Section 46, land in the District would not become available at below-market prices, and thus the relief would not end the harm of which appellants complain as required for standing by *Bowker v. Morton,* 541 F.2d at 1350. Enforcement of Section 46 would require that landowners execute recordable contracts for the sale of land in excess of 160 acres per private owner in order to receive irrigation water on the 160 acres. Sales of land to meet the 160-acre limitation must by statute be at lower than market prices. Appellees state that Section 46 does not apply after March 1, 1978, because one-half of the construction charges for the irrigation project will have been paid. We held in *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093 (9th Cir. 1977), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571 (1977), that the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. *Id.* at 1118. As we recognized in our opinion of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the *Tulare* formula will be *at* below-market prices. Indications at trial by the Solicitor of the Department of the Interior that the Department has in the past been willing to recommend that excess lands be sold at current market value does not override the fact that the Secretary of the Interior is bound by law to discount the value added by the construction project in fixing sale prices for excess lands. That there was pre-project irrigation does not excuse this requirement. *United States v. Tulare Lake Canal Co.,* 535 F.2d at 1112-14.

The decision of August 18, 1977, in this action is neither inconsistent with *Bowker* nor is it internally inconsistent. The Court in *Bowker* set forth a three-prong test for standing which we applied in the case at hand; the test requires "that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. The Court denied standing in *Bowker* to plaintiffs who sought enforcement of the acreage limitation by sale of excess lands at "reasonable" prices. Intervenors in the acreage case presently before us do not seek what this Court cannot provide, namely sale of land at any specified price defined by what price was "reasonable." Intervenors in the acreage case merely seek enforcement of the requirement in Section 46 that sales be at prices below current market value. The Court can issue a decree enforcing that code section that will ensure that any sales arising out of the acreage case are at below-market prices. While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses.

For the same reason, our decision is not internally inconsistent. Although the parties who claim standing to bring the issues before the Court are essentially the same in both the residency and the acreage cases, as we stated in our opinion, 559 F.2d at 522, relief from the harm in the residency case is much more speculative than it is in the acreage case. In the residency case, plaintiffs seek to purchase land at prices they could afford, whereas in the acreage case this same group alleges a desire to purchase land at below current market prices. The Court's order in the residency case cannot ensure sale of land at affordable prices, but in the acreage case it can enforce the pricing requirement of Section 46. Furthermore, in the residency case there is the alternative present for third party landowners of moving into the District which is not present in the acreage case.

Another reason our decision is not inconsistent with *Bowker* is that plaintiffs in *Bowker* did not even allege a desire to purchase land should it become available for sale,

whereas intervenors in the acreage case did allege such a desire.[2] The appellate court in *Bowker* stated that one reason it denied standing in that case was that plaintiffs did not allege that they sought to purchase land. 541 F.2d at 1350. Plaintiffs in *Bowker* also were not shown to meet the eligibility requirement to purchase land made available for sale as they were not residents of the district in which they sought to have the statute enforced. The gravamen of the complaint of the *Bowker* plaintiffs was that they were subject to a competitive disadvantage as farmers in a federally irrigated area in which the acreage limitation was in effect because the limitation was not being enforced in a state service area. Similar infirmities in the group of plaintiffs distinguish *Turner* v. *Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966), from the case at hand in that plaintiffs denied standing in that case did not allege a desire to purchase land in the irrigation district upstream as to which they sought to have the acreage limitation enforced.

Finally, although the Court in *Bowker* did indicate that in that case a court order discontinuing delivery of water to excess lands would not insure that the remedy sought of making land available for sale would result, the record in this case supports a different conclusion. This is not a case where "the solution to [intervenors'] problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by [intervenors]." *Bowker v. Morton,* 541 F.2d at 1350 (citation omitted). Both the District and the landowners are parties to the action, the latter having intervened as defendants below. Thus, both will be bound by a decree holding Section 46 applicable to excess lands and ordering a cutoff of water to any such lands where recordable contracts have not

2. The Amendment to Complaint in which the *Bowker* plaintiffs alleged a desire to purchase land in the area in question was not considered filed by the district judge because it had been filed without leave of court. Order filed August 2, 1973, *Bowker v. Morton,* No. C-70-1274. The First Amended Complaint filed by order of court thereafter on February 8, 1974, did not allege a desire to purchase land.

been executed. It is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley. Thus, "it [is] highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46." 559 F.2d at 522. *Compare id. with Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

The petition for rehearing of appellee State of California on the ground that the Court's opinion does not place a proper emphasis on the Wilbur letter and questions of fairness stemming therefrom is also denied. Appellees raise nothing that was not thoroughly considered in reaching the Court's decision.

Judges Browning and Koelsch have voted to reject the suggestions for a rehearing en banc, and Judge Wollenberg has recommended rejection of the suggestions for rehearing en banc. The full Court has been advised of the suggestions for en banc rehearing, and no judge of the Court has requested a vote on the suggestions. Fed. R.App.P. 35(b).

Accordingly, the suggestions for a hearing en banc are rejected.

II. Attorneys' Fees

Appellants move for attorneys' fees for the appeal of action No. 71-2124 in which they were successful in reversing the district court decision. As a consequence of the appeal, an estimated 233,000 acres of agricultural land will become available for purchase at below-market prices in parcels of 160 acres or less. Appellants advance two theories to support their claim for attorneys' fees: that the Civil Rights Attorneys' Fees Award Act of 1976 provides for counsel fees in cases brought under 42 U.S.C. § 1983 and that counsel fees may be awarded where, as here, a suit confers a substantial benefit to a class.

The argument that the Civil Rights Attorneys' Fees Award Act of 1976 entitles counsel to fees in this action is specious. That Act provides for the award of counsel fees in cases brought to enforce the civil rights laws, including 42 U.S.C. § 1983 which creates a cause of action for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Relying on the language of section 1983, appellants argue that the Civil Rights Attorneys' Fees Award Act of 1976 should be interpreted broadly to allow fees in cases which secure rights guaranteed by federal laws as well as those actions based on the federal Constitution. *Citing Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974). There is no need to reach this question, nor need we decide whether this lawsuit's vindication of the statutory rights of appellants was sufficient to make out a claim under 42 U.S.C. § 1983. This action was not brought pursuant to that code section, and therefore there is no statutory basis for the award of fees.

The theory that attorneys' fees should be awarded because this appeal will confer a substantial benefit on an ascertainable class has more promise for appellants,[3] but on analysis also fails to support an award of fees in this case.

The "substantial benefits" exception to the traditional rule disfavoring awards shifting legal fees is well recognized, *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), and survives the rejection in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) of the more sweeping "private attorney general" theory of counsel fees recovery. *See id.* at 257, 264-65 n.39. 95 S.Ct. 1612. The justification for this exception is that identifiable persons who benefit substantially from action of the party seeking fees should share the costs. "To allow the others to obtain full benefit

3. Appellants do not seek fees on the "common fund" theory, from which the substantial benefit theory derives. No basis for such a claim appears, as no "identifiable fund" has been "create[d], discover[ed], increas[ed], or preserv[ed]" by appellants' successful appeal. *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 768-69 9th Cir. 1977).

from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills,* 396 U.S. at 392, 90 S.Ct. at 625. *See also Hall v. Cole,* 412 U.S. 1, 5-6, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will "operate to spread the costs proportionately" and "with some exactitude" among the identifiable beneficiaries of the fee-seeker's success. *Mills,* 396 U.S. at 394, 90 S.Ct. at 626; *Alyeska,* 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney's fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser.[4]

The two leading Supreme Court cases are illustrative. In *Mills,* a shareholder prevailed in an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder's attorney's fees to the corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because "[T]he court's jurisdiction over the corporation as the nominal defendant ma[kes] it possible to assess fees against all of the shareholders through an award against the corporation." 396 U.S. at 395, 90 S.Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs

4. As the *Mills* Court put it: "[t]o award attorneys' fees in such a suit to a [successful] plaintiff . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). *See also Hall v. Cole,* 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).

through lowered dividends. The reasoning in *Hall v. Cole* is similar: the plaintiff-union member vindicated rights of free speech in union affairs and thus "rendered a substantial service to his union as an institution and to all of its members" (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit by taking a share of each member's dues.

Appellants urge, without supporting analysis, that their case is analogous to *Mills* and *Hall v. Cole.* If this is so, it must be because their success benefited a distinct class (those who will purchase excess irrigated land as a result of enforcement of the acreage limitation[5]), and because a suitable party is present (the District) against whom counsel fees can be assessed. Appellants satisfy the first requirement but not the second.

The class of beneficiaries to which appellants point is suitably "small in number and easily identifiable" (*Alyeska,* 421 U.S. at 264 n.39, 95 S.Ct. at 1625) to permit recovery under the substantial benefit theory.[6] It is not determina-

5. Appellants do not describe the precise nature of the benefits this class will reap, although the primary benefit — the chance to buy land below market price — is evident. If the benefits are pecuniary only, the substantial benefits theory may be unavailable. *See Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 768-69 & n.7 (9th Cir. 1977). *But see Mills v. Electric Auto-Lite Co.,* 396 U.S. 275, 394 & n.19, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1970) (approving cases applying theory to pecuniary benefits). We assume without deciding that appellants' success in this case will produce non-pecuniary as well as pecuniary benefits, and that the substantial benefits theory is available where the benefits are mixed.

6. Appellants estimate that, as a result of their appeal, 233,000 acres of excess land will be freed for sale. If those lands are purchased in parcels of the maximum size (160 acres), approximately 1,450 parcels would be available. Smaller parcels would increase the number of beneficiaries in the class, but there can be little doubt the number would remain suitably small. Cf. *Burroughs v. Bd. of Trustees,* 542 F.2d 1128, 1132 (9th Cir. 1976) (no basis for determining size of the beneficiary class); *Brennan v. United Steelworkers of America,* 554 F.2d 586, 606 (3d Cir. 1977) (classes of 1,400,000, of 8,987, of 85,000, and of 250,000 are small enough).

Moreover, members of the beneficiary class can be readily identified by their land purchases.

tive that individual members of the class will not be identifiable unless and until excess land is sold below market value as a consequence of appellant's lawsuit. Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries — those who would be unjustly enriched by not sharing in the cost of producing the benefit — and not against persons whose positions are not substantially bettered because of the victorious lawsuit. If clear identification of the beneficiaries will come about reasonably soon after conclusion of the lawsuit, the substantial benefit theory may be available to authorize a fee award, although fixing and collecting the award would have to await identification of the beneficiaries. Cf. *Van Gembert v. Boeing Co.,* 573 F.2d 733, 736-37 (2d Cir. 1978).

But appellants fail to satisfy the second requirement: they have made no showing that the District is a proper party to be charged with appellants' attorneys' fees under the substantial benefit theory. The District is not in the same position as the corporation in *Mills* or the union in *Hall v. Cole.* In those cases the beneficiaries had pre-existing relationships with the corporation or union, and had contributed funds to the treasury from which the fee award was to come.[7] Thus, because the result secured in *Mills* and *Hall v. Cole* was, by its nature, of benefit to each shareholder or union member, the court had "reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting" through charging fees to the treasury to which each shareholder or union member had contributed in common. *Alyeska,* 421 U.S. at 265 n.39, 95 S.Ct. at 1625 n.39. Cf. *Skehan v. Bd. of Trustees of Bloomsburg State College,* 538 F.2d 53, 56 (3d Cir. 1976) (en banc). In this case, the result achieved is not beneficial to all landowners within the District. Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there

7. *See* Note, *Fee Awards and the Eleventh Amendment,* 88 Harv.L. Rev. 1875, 1883 (1975).

would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.

Appellants suggest no alternative method of using District revenues as a vehicle to procure fees from the as-yet-unidentified beneficiaries. Their motion is to charge the District now for their fees. If an alternative is possible,[8] appellants have not advanced it, and the District has had no opportunity to respond. There is no basis before us for assessing attorneys' fees against the District.

III. Costs

Appellants who were successful on appeal in No. 71-2124 have submitted a bill of costs in timely fashion pursuant to Federal Rule of Appellate Procedure 39(c). Appellants in Nos. 73-1333 and 73-1388, who were successful on appeal of the issues raised in those cases, did not submit a timely cost bill because they believed that these three cases had been consolidated for appeal and that therefore under Federal Rule of Appellate Procedure 39(a), a split decision had been rendered, and no party was entitled to costs because this Court did not order that costs be allowed.

8. It might be suggested that the District could use its powers to levy assessments against land with the District (*see* Cal. Water Code §§ 25500-26500) or to collect charges for water service to District landowners (*id.* §§ 22280-22283) to pass fee costs on to the beneficiaries. We do not know whether the District has the power under state law to tax such supplemental amounts against a distinct class of landowners. We do not know if it would do so (assuming it has the power) absent a court order. We do not know if an order requiring such surcharges would comport with principles of comity or with the Eleventh Amendment. Moreover, we have found no case holding attorney's fees assessable against a governmental body, as opposed to a union, corporation, or similar private body, on a pure substantial benefits rationale. *See* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849, 897, 920-21 (1975). *See also* Note, *Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation*, 58 Minn.L.Rev. 933, 944-45 (1974).

Appellants have not advanced this surcharge possibility. We need not pass upon it *sua sponte* and we decline to do so in light of the substantial questions it raises.

Federal Rule of Appellate Procedure 39(a) reads in relevant part that "if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." The cases giving rise to this appeal were tried separately below, and separate judgments were rendered. This Court's order of August 6, 1973, in No. 71-2124, provided that the issues arising out of these cases would be considered together on appeal, but it did not formally consolidate the cases. Therefore the parties should be allowed costs in the case in which they prevailed. It has long been recognized that prevailing parties may be awarded costs on appeal and that such costs may be assessed against the states. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

The Court's opinion of August 18, 1977, in *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), should be modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph on page 520. Because that sentence mislead them, appellants in Nos. 73-1333 and 73-1388 are granted permission to file their bill of costs as received by this Court on September 8, 1977.

ACCORDINGLY, IT IS HEREBY ORDERED that this Court's opinion of August 18, 1977, in *United States v. Imperial Irrigation District*, 559 F.2d at 520, is modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph.

IT IS FURTHER ORDERED that the bill of costs heretofore lodged on behalf of appellants W. L. Jacobs, et al., in Nos. 73-1333 and 73-1388, may be filed by the Clerk and that such filing shall be deemed timely.

IT IS FURTHER ORDERED that appellants in No. 71-2124 be awarded costs in the amount of $3,218.25.

IT IS FURTHER ORDERED that appellants in Nos. 73-1333 and 73-1388 be awarded costs in the amount of $3,783.16.

APPENDIX C

UNITED STATES of America,
Plaintiff,

v.

IMPERIAL IRRIGATION DISTRICT,
a corporation, Defendant,

John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., Landowner Defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Valley in California.

State of California, Intervening
Defendant.
No. 67-7.

United States District Court,
S. D. California.
Jan. 5, 1971.

MEMORANDUM OPINION

TURRENTINE, District Judge.

I. JURISDICTION AND NATURE OF THE CONTROVERSY

This is a civil action brought by the United States. This court has jurisdiction under Title 28, § 1345 of the United States Code. An actual controversy within the jurisdiction of this court exists as to whether the land limitation provisions of reclamation law (hereinafter "acreage limitation" or "160-acre limitation") have any application to privately owned lands lying within the boundaries of said defendant Imperial Irrigation District (hereinafter "District").

The parties to this controversy are plaintiff United States of America, defendant District, landowner defendants John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., and each of them, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the District (hereinafter collectively, "landowner defendants") and intervening defendant State of California (hereinafter "California"). Heretofore, by orders duly entered, California and the landowner defendants were granted leave to intervene herein, the latter pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure as representatives of a class consisting of some 800 persons, each of whom own irrigable lands in excess of 160 acres. The aggregate holdings of the members of the class were approximately 233,000 acres as of September 3, 1965.

Plaintiff contends that the 160-acre limitation applies to privately owned lands within the District; and all of the defendants contend in all respects to the contrary.

There is no controversy between plaintiff and the State of California over the application of the excess land laws to the state lands in its Imperial Waterfowl Management Area. The United States, the defendant District and private landowner defendants agree with the State of California that those state lands are not subject to the excess land laws.

This opinion incorporates the court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

II. HISTORICAL BACKGROUND

The Imperial Irrigation District consists of lands in the Imperial Valley in California. Due to the below-sea-level topography of the Imperial Valley area, it was recognized as early as the middle of the 19th century that irrigation by means of diversion and gravity flow from the Colorado River was feasible. In comparatively recent geologic time, the Gulf of California extended inland to the northwest. Its upper limits reached northwind of Indio. Through the

years, the heavily silt-laden Colorado River deposited sediment and built up a low, flat deltaic ridge entirely across the ancient gulf, cutting off the upper portion from its connection with the ocean. The resulting basin was then an inland sea with a surface area of nearly 2,000 square miles. The greatest depth of this sea was about 320 feet. Deprived of its connection with the Gulf of California, the severed sea dried up, and a portion of the bed which it occupied is now known as the Salton Basin. The greater area around and including this basin is known in its northern part as the Coachella Valley and in its southern part as the Imperial Valley.

In its natural condition, the entire region was an unproductive desert. The annual rainfall averages from two to three inches. The Colorado River and the Colorado River Delta east and south of the Imperial Valley are slightly above sea level. From the delta, the land slopes gradually north and west toward the center of Imperial Valley, which is almost entirely below sea level.

During occasional flooding of the Colorado River, the overflow waters would flow down the slopes of the delta northward into the bottom of the great depression and the Salton Basin. These floodwaters would concentrate more or less in depressions and channels leading from the delta region into what is now known as Salton Sea. These channels, or depressions, form natural canals for diversion of the Colorado River waters into Imperial Valley.

The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant District, which was organized in July of 1911. These appropriations and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary

with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sand-hill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

The Alamo Canal, from its point of reentry into the United States, as well as the lateral canals through which water diverted from the river was ultimately distributed to land in the Valley, were owned by seven mutual water companies which were organized by the California Development Company. The stock in such mutual water companies was ultimately acquired by the individual landowners to whose land the water was supplied.

By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,440 in 1919, and 424,145 in 1929, the year when the Boulder Canyon Project Act took effect.

In 1905, the Colorado River broke through its banks, which had over the years been built up above the surrounding terrain, and completely changed its course, sending a flood of water through the Alamo Canal and over the broad flat area of Imperial Valley. As a consequence, for many months the entire flow of the River passed through the washed-out heading, through the Alamo Canal and into Imperial Valley, creating Salton Sea with a surface area of 330,000 acres, and threatening the entire valley with destruction. The surface of the Salton Sea, formerly nearly dry at an elevation of 273 feet below sea level, was raised to 190 feet below sea level. The efforts of the California Development Company to close the breach were unsuccessful. The Southern Pacific Company's tracks being endangered, the Southern Pacific Company advanced funds to the California Development Company to control the River and took con-

trolling interest therein as security. By utilizing its own resources the Southern Pacific Company closed the breach in the west bank of the River and returned the River to its channel. In the Spring of 1916, the Southern Pacific Company foreclosed on the California Development Company's interests and, in June of that year, transferred them to defendant District.

In 1922-1923 District acquired all of the mutual water companies that had been organized by California Development Company. Since that time and until the present, the District has performed the entire function of diverting, transporting and distributing the water supply to farm holdings in Imperial Valley.

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. It became effective June 25, 1929.[1]

The construction of the All-American Canal was authorized as part of the general project authorized by the Boulder Canyon Project Act (hereinafter "Project Act" or "Act") of December 21, 1928, effective June 25, 1929, 45 Stat. 1057, 43 U.S.C. § 617 et seq.

At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by and with Colorado River water, carried

1. The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the Acts of the Legislatures of the participating states. Congress approved it in section 13 of the Boulder Canyon Project Act, 43 U.S.C. § 6171.

through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,000 acres irrigated with water transported through the All-American Canal.

Pursuant to the Project Act, the Government constructed Hoover Dam, at Black Canyon, and incidental works, completing the construction of the dam in 1935. On February 1, 1935, under the direction of the then Secretary of the Interior (hereinafter "Secretary"), Harold L. Ickes, the Government began storing water in Lake Mead, the reservoir created by Hoover Dam, and since that date the Government has continuously operated and maintained Hoover Dam for the purposes specified in the Project Act.

On December 1, 1932, the United States and the District, acting pursuant to the Project Act, entered into a contract providing, *inter alia,* for construction of a main canal connecting Imperial and Coachella Valleys and requiring repayment by the District for the costs of construction. Due to conflicts not material to this case, Coachella Valley landowners were not included in the District, but formed a separate District, the Coachella Valley County Water District, which executed a similar, though independent, contract with the United States in 1934 calling for construction of water delivery structures and delivery to lands in Coachella Valley.

Pursuant to its 1932 contract with the District, the United States constructed Imperial Dam and the All-American Canal, commencing construction in August, 1934. In 1940, the United States, while retaining the care, operation and maintenance of these facilities, commenced delivering water through the All-American Canal for use within the District. Also pursuant to the contract, the Secretary transferred to the District, on March 1, 1947, the care, operation and maintenance of the main branch of the All-American Canal west of Engineer Station 1098.

Since 1942, the District's entire water supply has been carried through the All-American Canal. Title to the Imperial Dam and the All-American Canal, as well as to Hoover Dam, is in the United States.

On March 4, 1952, the contract between the United States and the District was amended by a supplemental contract. On May 1, 1952, the Secretary transferred to the District the care, operation and maintenance of the works east of Engineer Station 1098.

The All-American Canal System, as provided for in the contract of December 1, 1932, was declared completed by the contract of March 4, 1952, between the United States and the District; repayment of construction charges commenced on March 1, 1955. The District's financial obligation was fixed at approximately $25,000,000, repayable in forty annual installments, without interest. All such payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydroelectrical facilities of the All-American Canal, costing the District approximately $15,000,000. The cost of Hoover Dam and powerplant, estimated in 1965 as $174,732,000, is being repaid with interest at three percent primarily from power revenues at the dam. One exception to this is that $25,000,000, of the cost of the dam, which was allocated to flood control, will be carried interest free by the Government until 1987.

III. DEVELOPMENT OF THE CONTROVERSY

The 1932 contract provided, *inter alia,* for repayment by the District of the cost of the project works. It did not contain any provision requiring that acreage limitation apply to private lands within the District. On February 24, 1933, Secretary of the Interior, Ray Lyman Wilbur, in a letter mailed to the District, ruled that the 160-acre limitation did not apply to privately owned lands within the District.[2]

The Wilbur ruling was followed for 31 years and gave rise to an administrative practice which held the 160-acre limitation to be inapplicable to private landholdings within the District and which endured for the same period and down to the rendition of Solicitor Frank J. Berry's opinion

2. The full text of the letter is published in 71 Decisions of the Department of the Interior 496, App. E at 529.

of December 31, 1964.[3] In that opinion, the Solicitor concluded that Secretary Wilbur's 1933 ruling was erroneous and that the Boulder Canyon Project Act by its plain terms incorporates those provisions of reclamation law which impose acreage limitation on lands served from federal reclamation projects, including the privately owned lands within the District.[4]

Subsequent to this ruling, the Department for several years attempted to negotiate a new contract with the District which would have incorporated acreage limitation. The failure of these negotiations resulted in this action for declaratory relief.

IV. THE BASIC ISSUE

The question of whether the 160-acre limitation has any application to privately owned lands within the boundaries of the Imperial Irrigation District depends upon an interpretation of the Project Act. In deciding this case, defendants urge the court to limit its inquiry to a judicial review of the 1933 Wilbur ruling. They contend that because of the longstanding administrative practice and the reliance thereon by landowner-defendants in the District, Wilbur's interpretation should be upheld if there is any reasonable basis for his decision, citing Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, reh. den. 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283 (1965). The court declines to follow this course and believes that this statement of the *Tallman* rule should not be controlling in this case for the following reasons.[5] In *Tallman,* the suit was brought by

3. 71 Decisions of the Department of the Interior 496.

4. The study leading up to this opinion was prompted by a letter dated August 7, 1961, from Senator Clinton P. Anderson, Chairman of the Committee on Interior and Insular Affairs, to Secretary Stewart Udall. In the letter, Senator Anderson advised the Secretary that he had received complaints from Southern California that the acreage limitation provisions of reclamation law were not being enforced in the Coachella and Imperial Valleys.

5. There is of course no quarrel with the principle that in problems of statutory construction great deference is given to the administrative interpretation. See Udall v. Tallman, *supra,* 380 U.S. at p. 16, 85 S.Ct. 792 and cases cited therein.

an unsuccessful applicant for an oil and gas lease in the Kenai National Moose Range in Alaska. For many years, the Secretary of the Interior had interpreted Executive Order 8979 and Public Land Order 487, which withdrew certain lands from settlement and commercial exploitation, as not prohibiting oil and gas leases because they were not "dispositions" as that term is found in the Executive Order 8979. The first applicants received the particular lease in question; the unsuccessful applicant asserted that these regulations had closed the lands to such leases and that his lease should be issued because the prior applicants had applied when the lands were closed under the terms of these regulations. The court held that the Secretary's established interpretation was reasonable and hence entitled to controlling weight. The court observed that great deference is given to administrative interpretation of statutes, and that:

> "When the construction of an *administrative regulation* rather than a statute is in issue, deference is even more clearly in order."[6] (emphasis supplied)

In this case, the basic problem is the meaning of an Act of Congress, not an administrative regulation. In addition, the controversy in *Tallman* was essentially a competition of private interests for commercial leases, while the decision whether acreage limitation applies under the Project Act involves important considerations of national policy, making this case less appropriate for application of the estoppel-like features of *Tallman*. If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law. Finally, in *Tallman* there was a consistent administrative practice, while here the Government has repudiated its former interpretations. The court therefore adopts the goal of determining whether Congress intended in the Project Act to apply acreage limitation to privately owned lands in the Imperial Valley.

This is the first stage of a bifurcated trial. Not included in this phase of the proceedings are the nature and extent of "present perfected rights" of the land-owner-defendants, as

6. Udall v. Tallman, *supra*, at p. 16, 85 S.Ct. at p. 801.

that term is defined in the Supreme Court decree in Arizona v. California, 376 U.S. 340, 341, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964), or the issue of whether the landowners have any "vested rights" to Colorado River water as against the United States.

V. THE STATUTORY LANGUAGE

Plaintiff contends that the Boulder Canyon Project Act is a reclamation project, and that §§ 1, 4(b), 12 and 14 incorporate general reclamation law, one portion of which is § 46 of the 1926 Omnibus Adjustment Act, 43 U.S.C. § 423e. The latter statute provides that no privately owned lands in excess of 160 acres shall receive water from a new project or new division of a project. Therefore, the acreage limitation must apply to private lands within the District.

Four sections in the Project Act advert to reclamation law. Section 1 provides that construction costs for the canal are to be reimbursable as provided in the reclamation law.

Section 4(b) of the Project Act instructs the Secretary to provide for revenues

> "* * * by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law * * *"

Section 12 defines reclamation law as the 1902 Reclamation and Acts "amendatory thereof and supplemental thereto."

Section 14, heavily relied on by plaintiff, states:

> "This [Act] shall be deemed a *supplement to the reclamation law,* which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided.*" (emphasis supplied)

Plaintiff asserts that the phrase "construction operation and management of the works" includes water delivery. Since

§ 46 of the 1926 Act was the most recent addition to reclamation law at the time the Project Act was passed, it applies to condition delivery of water upon compliance with acreage limitation.

Plaintiff continues by pointing out that §§ 1 and 4(b) of the Project Act require repayment contracts pursuant to reclamation law, and the only means of contracting in 1932 was in accordance with § 46 which required acreage limitation. Thus, the 1932 contract necessarily incorporated an acreage limitation applicable to private lands. Limited to these facts, plaintiff's theory of the statute is disarmingly simple.

Closer examination reveals, however, that the references to reclamation law are carefully qualified, most noticeably by the § 14 language that reclamation law applies "except as otherwise herein provided." And Congress has "otherwise provided" in § 5 that the Secretary may contract for storage and delivery of water.[7] Section 5 does not refer to reclamation law or acreage limitation, and this is the section where such reference would be most logical if water delivery is to be conditioned on acreage limitation. Where Congress has employed a term in one place and excluded it in another, it should not be implied in the section where it is excluded. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). The repayment provisions of § 4(b) are limited to expenses of construction, operation and maintenance; there is no mention in this section of water delivery.

Section 1 of the statute requires reimbursement for the main canal and auxiliary structures under reclamation law, but the clause immediately following this language, "* * *

7. Section 5 provides in part as follows:

> "[That] the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof * * * upon charges that will, * * * in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this [Act] and the payments to the United States under subdivision (b) of Section 4."

and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy * * *," suggests that the reference to reclamation law merely establishes the principle expressly added, i.e., that the works are not to be paid for by the sale of power. Perhaps most damaging of all to plaintiff's case is the sentence next following:

> "Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation * * * in the Imperial or Coachella Valleys."

This express exemption from charges for water is one example of the distinction between water delivery and the concepts of reimbursement for project costs and the "construction, operation and maintenance" which is drawn throughout the statute. Other examples are found in Sections 8(a)[8] and 8(b).[9] This treatment hardly supports the conclusion that the phrase "construction, operation and maintenance" in § 14 includes water delivery.

In considering plaintiff's incorporation theory, an essential inquiry is whether § 46 is consistent with other terms of the Project Act. A comparison of section 4(b) of the Project Act with § 46 of the Omnibus Adjustment Act reveals differences which point to a displacement of § 46 by the terms of the Project Act. Section 46 contracts are mandatory, while § 4(b) contracts are discretionary. Section 46 deals with both repayment and limitation on water delivery, but § 4(b) does not mention water delivery be-

8. Section 8(a) provides in part:

> "The United States * * * shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation * * * *and* the storage, diversion, delivery, and use of water * *" (emphasis supplied)

9. Section 8(b) provides in part:

> "Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, *including* the appropriation, delivery, and use of water * * * shall observe * * * the terms of such compact." (emphasis supplied) The use of the word "including" seems intended to emphasize the distinctions developed elsewhere.

cause § 5 covers that topic. And § 46 contracts must be executed before water delivery, while § 4(b) contracts are to be executed before money is appropriated. From this it appears that the only item in § 46 not expressly provided for in the Project Act is the acreage limitation, an issue of social policy and not mere technical details of contracting. It is unlikely that Congress would relegate an issue as important as acreage limitation for private lands to indirect inclusion. This belief is reinforced by § 9 of the Project Act, which expressly limits public land entries entitled to use project water to 160 acres. The absence of a similar provision for private lands indicates that Congress did not apply acreage limitation to private lands. If the Project Act did incorporate general reclamation law, then § 3 of the 1902 Act[10] would apply and the specific direction of § 9 would be unnecessary.

Plaintiff's contention that the 1932 contract between the Government and District was made pursuant to § 46 is unsupported. The contract at Article I recites that it was made pursuant to the 1902 Reclamation Act "and acts amendatory thereof or supplementary thereto * * * and particularly pursuant to" the Project Act. Consequently, the contract could simply have been made pursuant to § 5 of the Project Act and § 1 of the 1922 Reclamation Act, 43 U.S.C. § 511.[11] The mere existence of § 511 forecloses the argument that § 46 of the 1926 Act provided the only means of contracting for repayment in 1932 and indicates that if Congress had intended § 46 to apply, it would have so stated.

10. 43 U.S.C. §§ 416, 432, 434. This statute provides that public lands proposed for irrigation under reclamation projects shall be withdrawn and subject to entry under the homestead laws in tracts of not more than 160 acres.

11. 43 U.S.C. § 511 provides that in carrying out the purposes of reclamation law, the Secretary may contract with irrigation districts for repayment of the costs, of construction, operation and maintenance of irrigation works. It also recites that no such contract will be binding on the United States "until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

Finally, the Project Act contains a comprehensive set of provisions relating to the rights of prior appropriators of Colorado River Water under the Colorado River Compact. Section 6 of the Project Act names as the second use of the dam and reservoir the "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact * * *" Under the decree in Arizona v. California construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right.[12] It was held in the court's opinion that the Secretary is required to satisfy present perfected rights.[13] This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights.

Section 8(a) of the Project Act subjects the United States and all water users to the controlling effect of the Colorado River Compact and constitutes a recognition by Congress of the guarantee of present perfected rights found in Article VIII of the Colorado Compact.

In Section 13 of the Project Act, the Colorado River Compact is approved. There is a second statement that the rights of the United States are controlled by the Compact, and the pre-project water rights are made covenants running with the land for the benefit of water users. These covenants are expressly made available to them for use in any litigation concerning Colorado River water.

The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections indicate that any provision such as acreage limitation which would

12. 376 U.S. 340, 341, 84 S.Ct. 755.

13. 373 U.S. 546, at 566, 581, 584, 83 S.Ct. 1468, 10 L.Ed.2d 542.

curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation apply to privately owned lands in the District.

Two additional propositions urged by plaintiff merit consideration in construing the statutory language. First, it is contended that the Project Act created a federal subsidy; and that therefore the Act must be strictly construed against the grantees (defendants). Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). However, the Project Act set in motion a great project conferring many and important benefits on all parties involved, including the United States.[14]

Among the national interests advanced by the Boulder Canyon Project are included:

(1) The inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.

(2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.

(3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.

(4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.

(5) The need to build a canal on All-American soil to put the United States in a position to bargain with

14. A report of the Congress which passed the Project Act detailed the benefits to all parties and described the Project as a joint venture by necessity:

> "Neither Imperial Irrigation District, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Report No. 592, 70th Congress, March 20, 1928 at p. 21.

the Mexican Government over the use of the water of the Colorado River.

(6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley. Application of this rule of construction does not advance the search for acreage limitation in the Project Act.

In a related argument, plaintiff also contends that because there is no express exemption from the acreage limitations of reclamation law, the limitation must apply. In this matter, reliance is placed on the following statement in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1959):

> "* * * where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment."

The guidance afforded by this remark is of doubtful value in this case, because in *Ivanhoe* the legal issue was whether state law precluded applicability of acreage limitation. The case is also factually distinguishable in that one basic ingredient of the Imperial Valley situation, the guarantee of perfected rights by Congress, was wholly lacking in the Ivanhoe context.[15]

Finally, it appears that the practice, cited by plaintiff, of enacting express statutory exemptions did not come into vogue until 1938 with the Colorado-Big Thompson Project.[16] This was some ten years after passage of the Boulder Canyon Project Act.

15. Indeed, it is doubtful whether the landowners before the court in *Ivanhoe* had any vested rights which Congress could have guaranteed. Certainly the landowners in the Ivanhoe District itself did not. See Ivanhoe Irr. Dist. v. All Parties and Persons, 47 Cal.2d 597, 654, 658, 306 P.2d 824 (Dis. op.); Ivanhoe Irr. Dist. v. McCracken, *supra*, 357 U.S. 275, 285, 78 S.Ct. 1174, 1180: "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right."

16. 43 U.S.C. § 386.

VI. LEGISLATIVE HISTORY

Secure in the belief that the statutory language clearly precludes an incorporation of acreage limitation, the court approaches legislative history with reluctance. The perils inhering in an imaginative recreation of the mind of Congress have been described by Mr. Justice Jackson, who termed the process a "psychoanalysis of Congress."[17] The language sought in the halls of Congress can usually be found in one place or another, and this is particularly true here, for the proceedings in Congress which culminated in the Project Act in 1928 spanned nearly a decade. However, the disagreement of experts in reclamation law, and the abrupt reversal of Departmental policy require some examination of legislative history for its teachings on Congressional intent.

The first Kettner Bill (H.R. 6044) in 1919 regarding construction of the Boulder Canyon Project did not contain an express provision for acreage limitation. In 1920, a second Kettner Bill (H.R. 11553) was introduced which contained a specific acreage limitation provision. It became apparent that more technical studies were needed before embarking on this ambitious project, and Congress in 1920 authorized a study which resulted in the comprehensive Fall-Davis Report.[18] The Report reaffirmed prior recommendations for an All-American Canal, and, based upon engineering studies of dam sites, recommended the construction of a high dam in Boulder Canyon.

Shortly after publication of the Report, Senator Hiram Johnson and Congressman Phil Swing introduced identical bills in the Senate and House proposing construction of an All-American Canal and a high dam near Boulder Canyon. These bills did not contain an express acreage limitation provision. Due to continuing controversy over dam sites, neither bill was reported out of committee during the 67th Congress.

17. United States v. Public Utilities Commission, 345 U.S. 295, 319-320, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

18. Sen.Doc. 142 Problems of the Imperial Valley and Vicinity 67th Cong. 2nd Sess. (1922).

When the 68th Congress convened, Senator Johnson and Congressman Swing again introduced identical bills, neither providing expressly for acreage limitation, but again neither bill was reported out of committee.

In the 69th Congress, Senator Johnson and Congressman Swing each introduced two more bills. During hearings in 1926 before the House Committee on Irrigation and Reclamation, the question arose whether either of the pending Swing Bills (H.R. 6251 and H.R. 9826) would make acreage limitations apply to private lands in the Imperial Valley. Congressman Swing and Dr. Elwood Mead, then Commissioner of the Bureau of Reclamation, both stated unequivocally that nothing in either of the bills would require a landowner to dispose of holdings in excess of 160 acres in order to receive water from the All-American Canal:

"MR. SINNOTT.[19] I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"DR. MEAD. This bill does not go beyond the provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands[20] at all.

"THE CHAIRMAN. [Congressman Addison T. Smith] That is reserved for future legislation?

"DR. MEAD. Yes, Sir.

"* * *

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DR. MEAD. Yes, sir.

"MR. SINNOTT. *No matter what that might be?*

"DR. MEAD. Yes.

19. Congressman Sinnott of Oregon.

20. I. e., a "new" project, in the language of the Department. And § 46 of the 1926 Omnibus Adjustment Act, upon which plaintiff relies, only relates to "new" projects or "new divisions" of old projects.

"MR. SINNOTT. What is that now in the Imperial Valley?

"DR. MEAD. Of course, it varies widely. There is not any law. *There are a good many large holdings there.*

"* * *

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?

"MR. SWING. *no, sir.*" (emphasis supplied)[21]

After completion of the hearings, Congressman Leatherwood of Oregon prevailed upon the committee to amend its print of H.R. 9826 by including an amendment requiring acreage limitation provisions in all contracts for the delivery of irrigation water.[22] H.R. 9826 was reported favorably out of committee, was debated on in the House early in 1927, but was not voted upon.

On the Senate side, one of the Johnson bills, S. 3331, was also favorably reported out of committee, but a vote on this bill was blocked by a filibuster conducted by Senator Ashurst of Arizona. During the floor debates on this bill, Senator Phipps of Colorado offered two amendments which would have incorporated express acreage limitation requirements. Neither of these amendments was adopted.

While this third set of Swing-Johnson proposals did not contain specific acreage limitations provisions, it did refer to reclamation law, making the act a "supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and maintenance of the works * * *," the predecessor of § 14 of the Project Act. The advice of Dr. Mead and Congressman Swing in Committtee, and the proffered amendments containing express acreage

21. Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Congress, pp. 32-33 (1926).

22. H.Rept. No. 1657 on H.R. 9826, 69th Cong. 2nd Sess. at pp. 29-30 (1926).

limitation provisions must be read in conjunction with this § 14 language in the bills, language which plaintiff now contends incorporates the acreage limitation features of § 46 of the 1926 Act. The timing of these occurrences is deserving of interest, for this was the Congress which months earlier had passed the Omnibus Adjustment Act of 1926 and would presumably be most sensitive to the possibility of incorporating § 46 acreage limitation into the Project Act by means of the language which was to become § 14.

The 70th Congress saw the introduction of the fourth Swing-Johnson bills, and at the outset one striking development is noted. While all previous Swing-Johnson bills had been identical, now Congressman Swing's bill, H.R. 5773, contained a specific acreage limitation proviso, but Senator Johnson's bill, S. 728, did not contain any such limitation.

H.R. 5773 was reported favorably and was passed by the House after brief debate. In the Senate, Senator Ashurst proposed another bill, S. 1274, which expressly included acreage limitation. The Senate committee refused to take action on this bill and likewise failed to incorporate an amendment by Senator Ashurst to S. 728 which would have added acreage limitation. S. 728 was reported out of committee with a recommendation for passage,[23] but Senate debate on the measure was again bogged down in a filibuster by the Arizona Senator. At the beginning of the second session, the Senate undertook consideration of H.R. 5773 under the floor management of Senator Johnson. Senator Hayden of Arizona had called attention to the discrepancy between the House and Senate versions in the matter of acreage limitation and proposed a corrective amendment. This amendment was not adopted. Senators Ashurst and Hayden on several occasions called attention to their rejected amendments and criticized the Senate bill for its lack of an acreage limitation applicable to private lands.[24]

The statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded.

23. S.Rept. 592 on S. 728, 70th Cong., 1st Sess., March 20, 1928.

24. See e. g., 69 Cong.Rec. 9451.

While the statements of opponents of a bill may not be authoritative, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticism."[25]

In this session, Sen. Johnson moved to substitute S. 728 for H.R. 5773 so as to retain the enacting clause of H.R. 5773 and the text of S. 728, leaving the potential Act without an express acreage limitation provision. Senator Johnson advised the Senate that H.R. 5773 contained "like purposes and like designs" and that the substitution was offered to "preserve orderly legislative procedure." Unanimous consent to the substitution was obtained.[26]

This action is puzzling no matter how you read the completed statute with regard to acreage limitation. Plaintiff contends that because there was unanimous consent, with no complaint even from Senators Ashurst and Hayden, the Senate believed that acreage limitation was incorporated by the general references to reclamation law and that there was no real difference. However, the numerous amendments proposed and the remarks during debate clearly show that Congress did not understand the two bills to be identical. Why someone on either side of the issue did not point to this significant difference is a question which probably cannot be answered now except by speculation.

To conclude the chronology, the Senate passed this version of the bill, and the House did likewise shortly thereafter. President Coolidge signed it into law on December 21, 1928.

There remains the question of why Congress desired to exempt these lands from acreage limitations when that policy had been a cornerstone of prior reclamation law. As noted in the discussion of the plain language of the statute, Congress enacted legislation recognizing prior rights to appropriation of Colorado River water which had been established by land cultivators in the Imperial Valley.

25. Arizona v. California, 373 U.S. 546, 583 n. 85, 83 S.Ct. 1468, 1489, 10 L.Ed.2d 542 (1963).

26. 70 Cong.Rec. 67 (1928).

The proceedings before Congress show that it was aware of the water rights held in Imperial Valley and that provisions of §§ 1, 6, 8, and 13 of the Project Act were designed to protect these rights from charges for water delivery and to insure that rights deriving from the Colorado River Compact would be recognized.[27] The steps taken to protect these rights were accomplished in recognition of the fact that the All-American Canal Project was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development.

VII. ADMINISTRATIVE PRACTICE

In construing a statute, weight must be given to interpretation placed on the statute by those charged with its administration. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). See also Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964). Respect for administrative interpretation is particularly appropriate when the administrative practice involves a " 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933)." Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961).

After consultations within the Department, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District by letter that the acreage limitation of reclamation law did not apply to private lands in the Imperial Valley. This letter stated in pertinent parts as follows:

"Early in the negotiations connected with the All-American Canal contract the question was raised regard-

27. See, e. g., Remarks of Senator King in 70 Cong.Rec. 528; Remarks of Senator Johnson 70 Cong.Rec. 233.

ing whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Ann M. Wright, 40 L.D. 116). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others."

Pursuant to Article 31 of the December 1, 1932 contract, judicial proceedings for the confirmation of the contract were instituted in the California Superior Court for Imperial County, sub nom. Hewes v. All Persons. (Civil No. 15460, unreported, 1933). The United States was not named a party but was kept advised of all steps in those proceedings and furnished with copies of all pleadings and papers filed therein. There was directly raised in the pleadings the question as to whether the 160-acre limitation had application to privately owned lands within the District. At no time did the United States voice opposition to the proposition urged in the litigation that the 160-acre limitation did not apply to landholdings within

the District, either by intervening in said action, appearing therein as amicus curiae or otherwise.

The decision in said cause of Hewes v. All Persons upheld the authorization for and the validity of the December, 1932 contract, as written, i. e., as being a contract which, consistently with the knowledge and intent of the parties thereto, contained no clause or provision having the effect of imposing the 160-acre limitation upon private landholdings within the District. The decision expressly held that the acreage limitation had no application to privately owned lands within the District. At all times during the construction of the All-American Canal and thereafter, the United States was aware of the holdings of the Superior Court. During the years when the All-American Canal was being constructed, no one in the Bureau of Reclamation or Department of the Interior suggested at any time that the acreage limitation was or should be applicable to the Imperial Valley.

In 1941, B. P. King, an attorney in the Bureau of Reclamation was authorized by Commissioner of Reclamation, W. J. Bunks, under instructions of the Secretary of the Interior, Harold L. Ickes, to make a comprehensive study of the excess land law. Pursuant to these directions, a report was filed in the same year entitled "The Excess Land Provision of the Federal Reclamation Law." In the report, Mr. King gave consideration specifically to the All-American Canal. Mr. King concluded that the excess land provisions of federal reclamation law were not applicable to the Imperial Valley.

In 1942, the General Counsel for the Federal Land Banks at Berkeley raised the question as to whether the 160-acre limitation was applicable to privately owned lands within the Imperial Irrigation District, Imperial County, California. The officials of the Federal Land Bank at Berkeley were informed by the Bureau of Reclamation that the limitation did not apply to such lands.

In 1946, the Bureau of Reclamation published its "Landownership Survey on Federal Reclamation Projects." This survey reflected no excess land acreage in the Imperial Valley.

Perhaps the most serious challenge to the administrative policy initiated by the Wilbur letter arose in 1944-1945 in connection with negotiations for a supplemental repayment contract to be entered into between the United States and the Coachella Valley County Water District. Solicitor of the Department Fowler Harper rendered an opinion[28] on May 31, 1945, stating that Section 14 of the Project Act carried into operation the acreage limitation provisions of reclamation law and that acreage limitation should be incorporated in the Coachella contract. He noted that the Wilbur letter was limited to Imperial Valley, but he criticized it on the basis that it disregarded all other excess-land provisions except section 5 of the 1902 Reclamation Act.

Following approval of the opinion by Secretary Ickes, a supplemental contract was executed on December 27, 1947, which imposed acreage limitations in the Coachella Valley. Compliance was voluntary on the part of the Coachella District, and no litigation on the issue ensued. Whether this acceptance was in recognition of the correctness of the ruling or merely reflective of the fact that there were few excess land holdings is unknown.

The Department was left in the seemingly anomalous position of enforcing acreage limitation in Coachella Valley under the Project Act while allowing excess land holdings in the Imperial Valley. It will be recalled that section 1 of the Project Act prohibits charges for the "use, storage or delivery of water * * in the Imperial or Coachella Valleys." This apparently contradictory state of affairs was called to the attention of Secretary Krug in 1948. In a letter to H. C. Hermann of the Veterans of Foreign Wars, commenting on this situation, the Secretary noted that as a technical matter the Harper opinion applied only to Coachella Valley. He further stated:

> "Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged

28. 71 Decisions of the Department of the Interior 496 Appendix H at p. 533.

with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to reply upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

> *To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be,* to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question." (emphasis supplied)

While the Secretary based his reluctance to press the Imperial matter further on considerations of fairness to those who had long relied on the Wilbur letter, he studiously avoided conceding that an inconsistency existed because Solicitor Harper himself was not informed of the status of water rights in the two districts. In his opinion, Solicitor Harper states:

> "Although the language of the letter of Secretary Willbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated."

There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act made that act a supplement to reclamation law, but no discussion of Congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8 and 13 of the Project Act. As has been noted in the discussion of statutory language, there is no inconsistency between a prohibition on charges for the use, storage and delivery of water and an acreage limitation provision, but there is such an inconsistency between recognizing the pre-existing rights and enforcing acreage limitation. The extent of pre-project development is the heart of the difference between the Imperial and Coachella situations, and this is why Secretary Krug's statement of what he would do if an inconsistency existed at that time does not represent serious and informed criticism of the Wilbur policy. That it was even less a rejection of that policy is evidenced, in part, by the negotiation in 1952 of a supplemental contract with the Imperial Irrigation District which made no mention of acreage limitation.[29] In Article 17 the supplemental contract reaffirmed the contract of December, 1932. Such reaffirmance expressly continued in effect the 1932 covenants with reference to the satisfaction of perfected rights, the controlling effect of the Colorado River compact and the other provisions of the 1932 contract earlier mentioned herein.

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29. Former Solicitor of the Department Edward Weinberg, who participated in these contract negotiations, testified that the Department had considered including an acreage limitation clause in the contract, but that this item was dropped because the Department was then preoccupied with the problem of treaty commitments to Mexico for delivery of water. Also, it was recognized that the District would not have signed a contract incorporating acreage limitation. After considering these factors, the Department was of the opinion that inclusion of acreage limitation for private lands would be "counter-productive."

On February 5, 1958, Solicitor Bennett of the Department of the Interior wrote the Solicitor General of the Department of Justice in connection with the then pending case of Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, and the question posed by Arizona in the oral argument therein as to whether the 160-acre limitation was applicable to the lands of the Imperial Irrigation District. Solicitor Bennett stated:

> "The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, *I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.*
>
> "The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. *There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect.*" (emphasis supplied)

This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administra-

tions.[30] From time to time during the period 1933-1964, a few individual members of the Department expressed doubt as to the validity of the Wilbur opinion, but these doubts never crystallized into an official repudiation. The Supreme Court commented on a similar situation in United States v. Midwest Oil Co., 236 U.S. 459, 472-473, 35 S.Ct. 309, 313, 59 L.Ed. 673 (1915):

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage iself — even when the validity of the practice is the subject of investigation."

VIII. CONGRESSIONAL KNOWLEDGE AND APPROVAL OF THE WILBUR INTERPRETATION

The failure of Congress to revise a statute or take other affirmative action with respect to an administrative interpretation of a statute is often competent evidence that the interpretation is congruent with the legislative design. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). *Cf.* Red Lion Broadcasting Co., Inc. v. Federal Communication Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of

30. Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation.

the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.

Beginning in 1943, efforts were made in Congress to exempt the Central Valley Project of California from the acreage limitation. These attempts generated a fierce debate over the basic policy of land limitation, which continued for more than three years. In the end, advocates of the 160-acre limitation were successful as regards its application to Central Valley. While the inapplicability of the acreage law to Imperial Valley was repeatedly cited to Congress, the validity of that position went unchallenged. On the contrary, the Bureau of Reclamation never flagged in its support of the Wilbur ruling. Typical is the testimony of Assistant Commissioner Warne before a Subcommittee of the Senate Commerce Committee in connection with the Omnibus Rivers and Harbors bill of 1944:

> "Representative ELLIOTT: Why was the limitation lifted in the Southern part of California down in the Imperial Valley? Why was 160-acre limitation lifted? That applied there, just the same as it did elsewhere.
>
> "MR. WARNE: No, there was never a 160-acre limitation applied to the Imperial Valley.
>
> "Representative ELLIOTT: It came under the same Act, the Act of 1902.
>
> "MR. WARNE: No, I am sorry, I think you will find that the Boulder Canyon Act authorized the All-American Canal, and that the provision did not apply there except as to public lands . . ."[31]

31. Hearings on H.R. 3961, before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., Part IV, page 599 (1944).

In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.

At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it.

It has been observed that to attribute significance to the inaction of Congress is often a "shaky business."[32] In this case, however, some weight must attach to this knowing inaction. Congress would hardly have ignored the Department's failure to enforce an important provision of reclamation law. *Accord,* United States v. Gerlach Livestock Co., 339 U.S. 725, 735-736, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

The court accordingly holds that the defendant Imperial Irrigation District is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to any of the privately owned lands within the boundaries of Imperial Irrigation District.

The court further holds that the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District.

Counsel for defendants may present an appropriate judgment.

32. Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408-409, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1960).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant.* JOHN M. BRYANT, et al., Landowner defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervening Defendant.* BEN YELLEN, et al., *Applicants for Intervention.*	CIVIL NO. 67-7-T ORDER DENYING APPLICANTS' MOTION TO INTERVENE

This cause came on regularly for hearing before the court on the application of Ben Yellen et al. to intervene of right pursuant to Rule 24(a) (2); the United States of America appearing by Assistant United States Attorney, Raymond Zvetina; Imperial Irrigation District appearing by R. L. Knox, Jr., John M. Bryant, et al. appearing by O'Melveny & Myers, Pierce Works and Charles W. Bender; State of California, intervenor, appearing by Deputy Attorney General Neil Gobar; and Ben Yellen, et al. by Arthur Brunwasser. Applicants for intervention have moved for an order permitting intervention; for leave of court to take the deposition of Mr. David Warner, Chief of Litigation,

Lands and Natural Resources Division, Department of Justice; and for an order staying implementation of the judgment entered on February 9, 1971, until ten days after the ruling on these pending motions. The motion to stay implementation of the judgment is hereby ordered denied because there will be no delay in the issuance of the court's ruling. The motion for leave to take the deposition of Mr. David Warner is denied because there is no showing of the necessity therefor. The United States has no duty to disclose its decision concerning appeal during the sixty-day period within which an appeal may be taken.

The court finds that the application to intervene is timely made. Intervention after judgment is permissible if there is no substantial prejudice to the other parties. This litigation is now in its fourth year, and the limited nature of the participation sought, that of appeal, does not disturb the prior proceedings.

All of the defendants assert that the judgment in the 1933 case of *Hewes v. All Persons* (Civil No. 15460, Superior Court, Imperial County, California) is *res judicata* as to the applicants for intervention. Proceedings in the *Hewes* case were instituted pursuant to Article 31 of the December 11, 1932 contract between the United States and the Imperial Irrigation District and § 511 of Title 43 of the United States Code. The object of the suit was to determine the validity of the 1932 contract. In this action the question of whether the 160-acre limitation had application to privately owned lands within the District was litigated, and it was held there that the acreage limitation did not apply.

It appears that this proceeding *in rem* was intended to and did bind all persons claiming any right, title or interest in property located within the Imperial Irrigation District and that accordingly the intervention is precluded as a collateral attack upon a judgment entitled to full faith and credit.

However, regardless of the effect of the *Hewes* decision, it is incumbent upon the applicants to demonstrate "an interest relating to the property or transaction which is

the subject of the action." Rule 24(a)(2) Federal Rules of Civil Procedure. The interest supporting intervention has been described as a "direct, substantial, legally protectible interest in the proceedings." *Hobson v. Hansen,* 44 F.R.D. 18 (1968) The applicants here assert that they desire to buy excess land which may be sold if the government ultimately prevails in this lawsuit and is able to enforce acreage limitation in the Imperial Irrigation District, but this "interest" is no greater than that possessed by the general public. Several specific factors in this case illustrate how extremely speculative and remote is the interest asserted here. Before any possible sale of excess lands, the initial decision in the first phase of the lawsuit must be reversed on appeal. If this occurs, then there will be a second lengthy trial concerning the nature and extent of the landowner defendants' vested rights to Colorado River Water. If the government prevailed in that phase, a plan for disposition would have to be proposed and executed. In all probability, there would be some recognition of the added value of the land due to efforts of the current land owners. Applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market value. Because this is not a class action intervention, the capability of the named applicants to purchase the lands they desire is material. Furthermore, the requirement of reclamation law for recordable contracts to be approved by the Secretary of the Interior is in no way inconsistent with the customary and usual right of a seller to choose his purchaser. Finally, if the Secretary of the Interior were able to take a more active role in the disposition of excess lands, there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants. Cf. 43 U.S.C. §§ 186, 279.

It is also required that the interest of applicants for intervention be inadequately represented by existing parties. The court has observed the vigorous representation by counsel for United States in urging that acreage limitation applies in the Imperial Irrigation District and finds that the interest of applicants, if any, has heretofore and is now being adequately represented by plaintiff.

Accordingly, it is ordered that the motion for leave to intervene be, and the same hereby is, denied.

DATED: March 29, 1971.

/s/ HOWARD S. TURRENTINE
United States District Judge

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF IMPERIAL

IN THE MATTER OF THE VALIDATION OF A CONTRACT, DATED DECEMBER 1, 1932, ENTITLED "CONTRACT FOR CONSTRUCTION OF DIVERSION DAM, MAIN CANAL AND APPURTENANT STRUCTURES, AND FOR DELIVERY OF WATER" BETWEEN THE UNITED STATES OF AMERICA AND IMPERIAL IRRIGATION DISTRICT, THE EXECUTION OF WHICH WAS AUTHORIZED AT AN ELECTION HELD IN SAID DISTRICT ON THE 12TH DAY OF JANUARY, 1933. EVAN T. HEWES (Substituted for JOHN L. DUBOIS), et al., *Plaintiffs,* *vs.* ALL PERSONS, etc., *Defendants.*	No. 15460.
CHARLES MALAN, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, et al., *Defendants.*	No. 15454.

OPINION.

Charles L. Childers and D. B. Roberts, of El Centro, for Imperial Irrigation District.

Stewart, Shaw & Murphey, and Arvin B. Shaw, Jr., of Los Angeles, and W. O. Irving, of Riverside, for Coachella Valley County Water District.

H. W. Conkling, of San Diego, for Charles Malan.

Under date of December 1, 1932, the United States of America, acting through the Secretary of the Interior, entered into a contract with Imperial Irrigation District, whereby the United States agreed to construct a dam across the Colorado River, to be known as the Imperial Dam, and a canal from the said river to Imperial and Coachella Valleys, to be known as the All-American Canal. The contract recites that it is made pursuant to the Act of Congress approved June 17, 1902, (32 Stat. 388), and acts amendatory thereof and supplementary thereto, known as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928, designated as the Boulder Canyon Project Act (45 Stat. 1057). The contract requires that the execution of the same by the district shall be authorized by the qualified electors thereof at an election to be held for that purpose, and that the district shall prosecute proceedings in court for a judicial confirmation of the authorization and validity of the contract, without which authorization by the electors and confirmation by the court the United States shall not be bound. The District is organized under the California Irrigation District Act, approved March 31, 1897 (Stats. 1897, p. 254), and acts amendatory thereof and supplementary thereto. It entered into the contract pursuant to an act approved May 5, 1917. (Stats. 1917, p. 243). The latter act authorizes irrigation districts to contract with the United States under the Federal Reclamation Law, or any other act of Congress, for the construction of irrigation works, and provides that any contract between an irrigation district and the United States shall be submitted to a vote of the electors of the district and may be submitted to the court for a determination of the validity of the contract.

In compliance with the terms of the contract and of the last mentioned statute, an election was held in Imperial Irrigation District at which the voters approved the contract. Thereupon the first above entitled proceeding was commenced, which was designated during the argument and is herein referred to as the Validation Case. The second case is prosecuted by Charles Malan, an owner of real property and an assessment payer in Imperial Irrigation District, who alleges that the contract is void and seeks to enjoin the District from expending any moneys in furtherance of the contract. This case has been known and will be designated as the Malan case. Malan also filed an answer in the Validation Case, raising the same questions as in the complaint in his action. Coachella Valley County Water District, which is organized under the County Water District Act (Stats. 1913, p. 1049), and certain property owners therein filed a demurrer and an answer in the Validation Case. The Imperial Irrigation District demurred and answered in the Malan case. Both demurrers were argued and rulings thereon were reserved. A motion to consolidate the two cases was made and a ruling was likewise reserved. The cases were tried together under a stipulation that all evidence offered in either case should be deemed offered in the other in so far as applicable.

The defendant's assert that the Statute of 1917 is unconstitutional and that the contract is void in many particulars which will be separately considered.

The Validation Case was brought pursuant to Section 3 of the Act of 1917, which authorizes the submission of the contract to the superior court for determination as to its validity, and provides that the same proceedings shall be had as in the judicial determination of the validity of irrigation district bonds. In Section 68 of the Irrigation District Act is found the procedure for such an action.

1. INTEREST OF COACHELLA VALLEY IN VALIDATION PROCEEDINGS.

Counsel for the Imperial Irrigation District claim that Coachella Valley County Water District and the individuals who join in the answer filed by the latter district are not interested parties within the meaning of the statute, and that therefore they should not be permitted to answer or to defend against the validity of the contract.

The Boulder Canyon Project Act, among other things, authorizes the Secretary of the Interior to construct a main canal and appurtenant structures, located entirely within the United States, connecting the Laguna Dam, or other

suitable diversion dam, with the Imperial and Coachella Valleys, and provides that no charge shall be made for water or for the use, storage, or delivery of water for irrigation or for potable purposes in either of the said valleys. The contract provides for the construction of the canal and appurtenant structures to Imperial and Coachella Valleys, contains the consent of the United States that Coachella Valley may become annexed to the Imperial Irrigation District, and provides that if the said valley be not so annexed the canal and other works shall be reduced in size accordingly.

Evidence was introduced supporting the allegations of the answer as to the efforts made over a period of years and the large sums of money expanded by the Coachella Valley County Water District and the owners of property therein in the promotion and advancement of the plan for the construction not only of the All-American Canal, but of the Boulder Canyon Dam, and in obtaining appropriations for surveys, reports, etc. Evidence was given that the present water supply of Coachella Valley was meager and inadequate, that the water level was constantly lowering, that the Colorado River was the only source of a further water supply, and that without this water the land of Coachella Valley would be practically without value. Reports made to and bills introduced in Congress coupled Coachella Valley and Imperial Valley as the beneficiaries of both the Boulder Dam and the All-American Canal. All of these and other matters covered by the evidence show a present vital interest of the Coachella District in the contract and in the question of its validity, in the event that the lands in said district should later become a part of the Imperial Irrigation District.

Ultimately the Coachella District, by failing to become annexed to the Imperial Irrigation District, may cease to be an interested party, but until such time as it, after opportunity is offered, refuses to become a part of the Imperial Irrigation District it is interested to such an extent that the Coachella District, as well as the property owners therein, should be accorded the right to enter its defense and to present its objections to the validity of the contract.

2. MALAN'S CAPACITY TO MAINTAIN HIS ACTION.

It is also asserted by counsel for the Irrigation District that the Malan case is not properly before the court and should be dismissed. Section 3 of the statute of 1917, under which the Validation Case was brought, authorizes the board of directors of the district to submit the contract to the court for determination of its validity, and refers to the Irrigation District Act for procedure. Section 68 of the latter act authorizes a proceeding, such as this Validation Case, to be commenced by the board of directors of the district, and Section 69 provides that if no such proceedings shall have been brought by the board of directors, then any district assessment payer may bring an action to determine the validity of an assessment levied or bonds issued under the Irrigation District Act, — a contract under the 1917 act. An assessment payer's right to maintain an action depends upon the failure of the district so to do. While the Validation Case is pending he has no capacity to sue. The proceeding authorized by law having been commenced and prosecuted by the board of directors of the district, and Malan having filed his answer as a defendant therein, wherein he raises the same questions as are raised by the complaint in his action, his rights as an assessment payer will be fully protected in this court and, as well, upon appeal. The contract, as above stated, requires the District to prosecute to judgment proceedings in court for a judicial confirmation of the validity of the contract, and provides that the United States shall not be bound under the contract unless and until a confirmatory final judgment shall have been rendered. In addition to his prayer that the contract be declared void, Malan asks that the district be restrained from expending any moneys in furtherance of the contract or in endeavoring to have the same ratified. If the contract be valid, he has no case; if void, it will be so declared in the Validation Case. The maintenance of his action would seem to be an idle act and an unnecessary encumbrance of the record. The proper order is to sustain the demurrer to his complaint without leave to amend. This order, of course, will dispose of the notice to consolidate the two actions.

3. IS BOULDER CANYON PROJECT ACT IN EFFECT?

The defendants assert that the Secretary of the Interior was without authority to enter into the contract by reason of the fact that the Boulder Canyon Project Act has never become effective. That law, which constitutes the sole authority of the Secretary of the Interior to construct not only the Boulder Dam (at the time of the trial and until quite recently known as Hoover Dam), but as well the diversion dam and the All-American Canal covered by the contract in question, provided in Section 4(a) that the act should not take effect, that no authority should be exercised thereunder, and that no work should be begun and no moneys expended on or in connection with the works or structures provided for in the act, unless and until (1) the seven states signatory to the Colorado River Compact should have ratified the said compact and the President by public proclamation should have so declared, or (2) if said states failed to ratify the said compact within six months from the date of passage of the act, then until six of the said states, including California, should have ratified the said compact and should have consented to waive the provisions of the first paragraph of Article XI of the compact, (which made the same binding only when approved by each of the seven signatory states), and the President by public proclamation should have so declared, and further until California, by act of its legislature, should have agreed irrevocably and unconditionally with the United States, for the benefit of the other six states, to a limitation of the use by California of water from the Colorado River as set forth in the said section 4(a) of the Boulder Canyon Project Act. The State of Arizona failed to ratify the compact, but the other six states ratified the same and waived the portion of Article XI of the compact above mentioned, and the California legislature passed the water limitation act as required. We are therefore concerned only with condition or clause (2) above mentioned in determining whether the act became effective before the execution of the contract under consideration.

The statute of California waiving the first paragraph of Article XI of the Colorado River Compact was approved by

the Governor on March 4, 1929, (Stats. 1929, p. 37), and the Water Limitation Act required by section 4(a) of the Boulder Canyon Project Act was approved on the same date. (Stats. 1929, p. 38.) On July 25, 1929, President Hoover issued a proclamation declaring (a) that the seven states had not ratified the compact within six months from the date of passage and approval of the Boulder Canyon Project Act; (i) that six states, including California, had ratified the compact and had consented to waive the required portion thereof; (c) that California had met the requirements of section 4(a) of the act necessary to render said act effective on six-state approval of the compact; and (d) "All prescribed conditions having been fulfilled, the said Boulder Canyon Project Act approved December 21, 1928, is hereby declared to be effective this date", (June 25, 1929).

The defendants claim that as neither the Waiver Act nor the Water Limitation Act contained an urgency clause, they did not take effect until August 14, 1929, ninety days after the adjournment of the legislature, (Const., Art. IV, Sec. 1), and that the declaration by the President in paragraph (d) of the proclamation that the Boulder Canyon Project Act was effective on June 25, 1929, was incorrect, premature, false in law, and therefore void. Section 4(a) of the Boulder Canyon Project Act *did* not require, as a condition to its becoming effective, that the President's proclamation declare the effective date of the act or that it contain any of the matter set forth in paragraphs (c) and (d) of the proclamation of June 25, 1929. Paragraphs (a) and (b) contained all that was required to be stated in the proclamation, and therefore paragraphs (c) and (d) may be ignored and disregarded as surplus. Even though the unnecessary declaration in paragraph (d) that the act was effective on June 25, 1929, was incorrect, the error was inconsequential.

Under condition or clause (2) of Section 4 (a) of the Boulder Canyon Project Act, the act became effective upon the occurrence of three events: (1) when six states, including California, ratified the compact and consented to waive the first paragraph of Article XI thereof; (2) when the President by his public proclamation so declared, and (3)

when the State of California, by act of its legislature, adopted the Water Limitation Act or agreement. Six states, including California, ratified the compact and consented to waive the required provisions thereof, the President so declared in the Proclamation, and California, by act of its legislature, adopted the Water Limitation Act. The fact that the proclamation was issued before the expiration of the period of ninety days after adjournment of the legislature did not detract from its validity. The statute had been passed and the President proclaimed that fact. The seventh state, Arizona, not having ratified the compact within six months from the passage of the Boulder Canyon Project Act, the President's proclamation not having been issued until after the expiration of the six months' period, and all of the conditions of the Boulder Canyon Project Act having been fulfilled by six states, including California, the last named act became effective, at the latest, on August 14, 1929, the date on which the Waiver Act and the Water Limitation Act took effect.

While not necessarily conclusive upon the court, it is a fact that the act has been construed as being in effect by governmental agencies. Congress has appropriated several million dollars for the construction of the Boulder Dam, a contract has been awarded therefor, and the dam is now under construction. Until the act became effective no money could be appropriated or expended for any of the works or structures authorized thereby. (Sec. 4(a) Boulder Canyon Project Act.) No question has been raised by anyone as to the validity of the appropriations or of the construction contract. In *Arizona v. California,* 283 U.S. 23, 449, 75 L.Ed. 1154, 1162, although the question was not directly involved, the supreme court referred to the act as having become effective. The acqueduct of the Metropolitan [illegible in original] upon the Boulder Dam for river control, is also under construction, and contracts have been made by the United States with various governmental and private agencies for the sale of power to be generated at the Boulder Dam.

We are of the opinion that the Boulder Canyon Project Act was in effect prior to the execution of the contract in question.

4. CONSTITUTIONALITY OF THE STATUTE OF 1917.

The authority of the Imperial Irrigation District to enter into a contract with the United States is contained in an act of the California legislature (Stats. 1917, p. 243), which will be herein referred to as the 1917 act. By this statute irrigation districts are empowered to cooperate and contract with the United States under the Federal Reclamation Act or any other act of Congress for the purpose of constructing irrigation works. The defendants assert that this act is unconstitutional for the reasons (a) that it is special legislation; (b) that it is discriminatory and not uniform in operation; (c) that legislative powers are delegated to Congress, to the Secretary of the Interior, and to the Secretary of the Interior and the District, acting together.

The Imperial Irrigation District is the first to take advantage of this statute, and the contract involved here is the first to be made pursuant to its provisions. Consequently in this proceeding the validity of the statute is to be considered for the first time.

In examining the constitutional questions raised, it must be borne in mind that, as said by our supreme court, an irrigation district is not a municipal corporation, but is a public corporation for municipal purposes — a state agency authorized by statute and formed for a specific purpose, that of furnishing water. The same purpose could be accomplished without the organization of a district in the manner provided in the Irrigation District Act, and without providing for the election of a board of trustees or directors by the land owners. The legislature might set up a district, delimit its boundaries, appoint a manager, and empower him to perform all of the functions that are performed by the district officers.

Consideration of the constitutionality of the 1917 act must be in the light of the 1914 amendment to Section 13 of Article XX of the Constitution. That section reads as follows, the said amendment consisting of all of the section beginning with and following the word "except": "The legislature shall not delegate to any special commission,

private corporation, company, association, or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state." It has been held that under the said section, as amended, the legislature has plenary power over irrigation districts. (*Barber v. Callaway,* 195 Cal. 1; *Willard v. Glenn Colura Irr. Dist.,* 201 Cal. 726; *Wores v. Imperial Irr. Dist.,* 193 Cal. 609.) And on the other hand it has been held that this section does not empower the legislature to pass such laws as it sees fit in regard to the affairs of irrigation districts untrammeled by the general requirement that loss of a general nature shall have a uniform operation. (*Mordecai v. Board of Supervisors,* 183 Cal. 434.)

(a) *Special Legislation.* It is claimed that the act is unconstitutional for the reason that it is special legislation in violation of subdivision 33, section 25, Article IV of the Constitution, which prohibits the passage of local or special laws "where a general law can be made applicable".

The first query that suggests itself is whether a general law, ample for all purposes of those districts that are able to finance themselves and to procure a sufficient water supply without outside aid, can be made applicable to districts that desire to enter into contracts with the United States for the purposes set forth in the statute, and that may be compelled to do so in order that they may obtain the benefits of Federal aid in projects which are necessary to the advancement or, possibly, to the very existence of the districts, and which they are unable to finance under the general Irrigation District Act, or in any other manner than with Federal assistance.

Upon the financial question, digressing momentarily from a discussion of the legal phases of the case, the report of Senator Johnson to the Senate, made March 20, 1928, which is set forth in the brief of Coachella District herein, stated: "The All-American Canal will carry a portion of the conserved waters to where they can be used for irrigation and domestic purposes. * * * Neither Imperial Irrigation District, the Coachella District, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Thus the economic reason for the statute permitting irrigation districts to enter into contracts with the United States is at once apparent, and it becomes necessary to consider only whether such districts may constitutionally be given rights and privileges that are not accorded to those which do not need, or at least do not seek, aid from the government.

The particulars in which defendants claim that the 1917 act is special legislation are that under the Irrigation District Act assessments are made according to value of property assessed, water is apportioned according to assessments paid, water is apportioned by the district, and the district has unsupervised control over change of boundaries, both as to inclusion and exclusion of lands; while under the 1917 act assessments are made according to benefits, water is apportioned according to benefits, water is apportioned in accordance with acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and district boundaries cannot be changed without the written consent of the secretary.

If a district enters into a contract with a private individual or with any state agency, it may do so pursuant to the laws of this state, but if it desires to contract with the United States, then it must do so according to the requirements of the laws of the United States, and subject to the departmental rules and regulations established by authority of such laws. The 1917 act gives power to irrigation districts to do anything required by the Federal laws to the end that they may receive the necessary assistance.

The legislature is authorized to make certain classifications, and if the same are founded upon reason and are not

arbitrary in their nature, the courts will not interfere. An act "applying uniformly to any single class in its entirety, when the classification is founded upon some natural, intrisic, or constitutional distinction, is not special legislation. * * * The legislature is vested, primarily, with the discretion to make the classification and it has been repeatedly held that courts will not disturb a legislative classification unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason." (*In re Sutter Butte By-Pass Assmt.*, 191 Cal. 650, 671, and cases cited.) In *People v. Central Pac. R.R. Co.*, 105 Cal. 576, the court held that the constitution did not require that all laws should have a uniform operation in every part of the state, and that it did not prohibit legislation for different classes of citizens, and said: "a law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law."

The court held, in the case of *Wores v. Imperial Irrigation District, supra,* that the act relating to the government of irrigation districts having an area of more than 500,000 acres was a general law, and was not in violation of subdivision 33, Section 25, Article IV of the Constitution. In the *Wores* case the court, after referring to the case of *Mordecai v. Board of Supervisors, supra,* which held that the exception in section 13 of Article XI of the constitution did not authorize the legislature to violate the provision of the constitution requiring uniformity in the operation of general laws, said that "when this requirement of the constitution is satisfied by finding a sufficient basis of classification in the attempted legislation, the legislature, in all matters touching the regulation and conduct of the affairs of these classes of governmental agencies, has been given an enlarged discretion by the terms of the aforesaid amendments to the constitution".

Additionally, there is the well established rule that "the discretion of the legislature to make these classifications is very wide, and when such classification is attacked in the courts it will be supported by every presumption in its favor". (*In re West,* 75 Cal.App. 591; *In re Cardinal,* 170

Cal. 519, L.R.A. 1915F, B50; *Wores v. Imperial Irrigation District,* 133 Cal. 609, 620; *In re Sutter Butte By-Pass Assessment,* 191 Cal. 650, 671.)

It is not necessary to cite the numerous other cases which may be found holding laws to be general, even though they were applicable only to a certain group. Tested by the rules laid down in the cases cited, the classification made by the 1917 act is not arbitrary, but is reasonable and is supported upon adequate foundation. If the United States provides the funds for the construction of the required works, it may legitimately require conformance to its laws, rules and regulations. The legislature, without violence to the constitution, may classify irrigation districts, and may distinguish as easily those districts contracting with the United States from those which do not do so, as it distinguished those having more than 500,000 acres from those having a less number of acres. The necessity therefor is clear.

(b) *Discrimination and Lack of Uniformity.* The next ground of attack on the 1917 act is that it is discriminatory and not uniform in operation. Section 11 of Article X of the Constitution provides: "All laws of a general nature shall have a uniform operation". The claim is made that because districts making contracts with the United States have powers not given to other districts, the statute is not uniform in its operation and discriminates as to such districts. Practically all that has been said with reference to the subject of special legislation is applicable here and need not be repeated.

To be uniform in operation, a statute need not operate universally, but it must operate uniformly upon all to which or to whom it may apply. It is general if it applies to all of a certain class alike, and operates uniformly upon and applies equally to all persons in the same category. To be general in its scope, a law need not include all classes of persons, but is within the provisions of the constitution if it relates to and operates uniformly upon the whole of any single class validly selected. The classification must be founded upon reason and must not be the product of the exercise of an arbitrary will. (*In re West,* 75 Cal.App. 591,

and cases cited; *Herow v. Riley,* 209 Cal. 507, 518; *Solousky v. Superior Court,* 180 Cal. 404; *Vail v. San Diego County,* 126 Cal. 35).

Does the 1917 act measure up to this rule, and is its classification a natural one? It is conceded that the act is not applicable to all irrigation districts in the state, but need it be so in order to escape censure? It provides a method of assessment, a system of water distribution and other regulations for those districts coming under its terms different from those applicable to other districts. But it is uniform as to all districts that bring themselves under its provisions. It does not alter the scheme of the original Irrigation District Act except as to the districts contracting with the United States, and it is uniform as to the latter. The classification of districts is not unnatural, unreasonable or arbitrary, and the statute operates uniformly upon all districts in the class to which it applies.

Again the case of *Wores v. Imperial Irrigation District, supra,* is authority, wherein the court held that the setting apart of districts having an area of more than 500,000 acres in a class separate and apart from those having a less area was not obnoxious to Section 11 of Article I of the Constitution.

(c) *Declaration of Legislative Powers.* The 1917 act is alleged to be void on the further ground that it delegates the legislative power of the state (1) to Congress, in sections 1, 2, 4, and 6, by authorizing districts to contract with the United States under acts of Congress "hereafter enacted"; (2) to the Secretary of the Interior, in sections 2 and 4, by making every such contract subject to rules and regulations to be established by the Secretary, and in section 8, by authorizing the Secretary to determine whether the district may be dissolved or its boundaries changed; and (3) to the Secretary and the district, acting together, in sections 4, 5, and 7, by making the authority to execute the contract depend upon and be enlarged or modified by the provisions of the contract itself.

It is agreed that the legislature cannot constitutionally delegate its legislative power, though it may refer to some

other officer or board the power to determine whether a certain thing shall be done, after first prescribing a standard by which such officer or board is to be governed in reaching a decision. The question then is whether the legislature did, by the 1917 act, delegate any of its legislative power by providing that a contract might be made under acts of Congress "heretofore or hereafter enacted". The statute merely authorized irrigation districts to contract under any Federal law in force at the date of the contract. It did not adopt or purport to adopt, by reference or otherwise, any act of Congress then in force or subsequently to be enacted. Manifestly a district entering into a contract today with the United States would be compelled to do so under the statutes of the United States now in force, and not under a statute that may have been in force in 1917, and that has since been amended or repealed. If the clause with reference to Federal laws had been omitted entirely and if the statute had merely authorized irrigation districts to enter into contracts with the United States for the purposes stated in the act, the effect would have been the same, — this contract would have been executed under the statutes in force when it was signed, whether the same were in force in 1917, or only recently adopted.

If, when the 1917 act was adopted, there had been no Federal law authorizing the United States or any officer thereof to enter into contracts with irrigation districts, or with any other state agency, such a contract as the one involved here could not have been made for lack of federal authority. It could not be said that the legislature surrendered any of its legislative power merely by reason of the subsequently enacted Federal authority which imposed the conditions found in the reclamation law and in the Boulder Canyon Project Act. If Federal statutes were in force in 1917, or were adopted later, and if the California statute did not refer to the Federal laws, either then in force or thereafter to be adopted, the situation would have been the same.

With power vested in the legislature to form a district and to provide for its government, there seems to be nothing to prevent it from taking from the directors the right and power to change boundaries or to determine the conditions

under which they may be changed. Here it is provided by statute that after a district enters into a contract with the United States, its boundaries may not be changed without the consent of the Secretary of the Interior. An obligation of contract is imposed upon the district for the benefit of the United States.

It may be assumed that the water to be furnished is estimated by the Secretary to be sufficient in amount for the land in the district as existing or as provided for in the contract. As counsel for the districts point out, the United States is guaranteeing the water supply and its security cannot be permitted to be impaired by a change of district boundaries, either by enlarging or diminishing the area. If too much land is added to the district, the water supply will be insufficient for the enlarged district, thus rendering all of the land in the district less productive, or possibly nonproductive. If land is excluded from the district, even though, pursuant to section 84 of the Irrigation District Act, the excluded property would be answerable for and chargeable with the payment and discharge of the outstanding indebtedness, without water it would be less valuable, or perhaps of no value. In either event the contractual obligation of the district would be impaired. This could not be done even if section 8 were not in the statute. For this reason, if for none other, the provision requiring written consent of the secretary to a change in boundaries does not delegate any legislative power to him, but sustained the sanctity of the contract.

It is true, as stated in the argument, that the legislature cannot cede away its power of legislation, and that one legislature cannot pass a law which a succeeding legislature cannot amend or repeal. It does not follow, however, and it is not the law, that when contractual rights have intervened, the legislature, by amending or repealing the statute pursuant to which the contract was executed, may deprive a contracting party of the rights and obligations accruing to it under the contract and under the statute pursuant to which the same was executed.

The situation in the case of *Bottoms v. Madera Irrigation District,* 74 Cal.App. 681, relied on by defendants, was quite

different from that in the instant case. There the district entered into a contract to dissolve and to transfer its assets to a district which was to be set up in a manner not provided for by law. The court held it had no power to do so. Here we are construing a statute which the legislature had power to adopt, not a contract which was unauthorized by law. Besides, in the *Bottoms* case the Madera district was attempting by its own contract to destroy itself, while the statute here does not authorize the destruction of a district, but preserves the contracting district unimpaired and the area unchanged as security for the performance of its contract.

A district cannot impair the obligation of its contract and the legislature cannot authorize it to do so. The laws in force at the date of a contract are a part of the contract to the same extent as if they were written into the same at length. (*Bronson v. Kinzie,* 42 U.S. (1 How.) 311, 11 L.Ed. 143.)

The legislature, under its power over irrigation districts, may establish or change the boundaries or may delegate power so to do. The Irrigation District Act provides for the change of boundaries by the board of directors, but this power may be taken from them by legislature and the legislature may even prohibit entirely the change of boundaries. By the 1917 act the legislature did not do any of these things, but provided that the boundaries should not be changed without the written consent of the other contracting party, the United States.

This statute is not a delegation of legislative power, and does not authorize any person or board to legislate. It authorizes the execution of contracts for particular purposes. It is within the power of the legislature to declare and it did declare the conditions under which such contracts might be executed, and it set forth some of the provisions that might be placed therein. It is entirely a matter of contract and not of legislation.

5. VALIDITY OF CONTRACT.

Defendants oppose the validation proceedings, not only upon the several grounds hereinbefore examined, but upon

the alleged invalidity of certain portions of the contract. Some of the objections to the contract are dependent upon the constitutionality of the 1917 act and are disposed of with the discussion of that statute.

(a) *Ballot and Notice of Election.* Section 3 of the 1917 act requires that any proposal to enter into a contract with the United States thereunder shall be voted upon at an election to be held in the district. It is required that the notice of election contain "a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property, if any, to be conveyed by the district" to the United States, and that the ballots at such election shall contain "a brief statement of the general purpose of said contract and the amount of the obligation to be assumed, as aforesaid". The statement appearing in the notice and on the ballot, after setting forth the general purposes of the proposed contract, was that "the amount of the obligation to be assumed by the district for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, shall not exceed $38,500,000 together with $768,000 still unpaid" on a prior contract with the United States.

The defendents claim that the notice and the ballot did not meet the foregoing requirement, because, according to the allegations of the defendants, when the diversion dam is constructed, the water level of the Colorado River northerly therefrom will be raised to such an extent that damage will be caused to land in Palo Verde Irrigation District, in California, and in Cibola Valley, in Arizona, both by causing overflows and by raising the water table under the valleys to such extent that the productiveness of the soil will be destroyed, and that the notice of election and the ballot were void for the reason that neither contained any reference to such possible damages or to the liability of the district therefor. Article 7 of the contract requires the district "to repay to the United States expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion

dam and main canal, the incurrence of which increases expenditures by the United States beyond" the contract price of $38,500,000.

Section 3 of the 1917 act requires the notice of election to contain a statement of the maximum amount payable to the United States "for construction purposes, cost of water supply and acquisition of property" and that the ballot shall contain a brief statement of "the amount of the obligation to be assumed, *as aforesaid*". The notice is not required to set forth any amount except that which is agreed to be paid for construction purposes, cost of water supply and acquisition of property. It is not required to refer in any manner to the damages which the United States may incur and which the district may be required to repay. The notice was in strict literal accord with the statute, as was the ballot, the latter containing a statement of the amount of the obligation to be assumed, "as aforesaid", which refers to nothing other than the statement required to be set forth in the notice.

Evidence was introduced on behalf of both parties upon the question of damages to land in the Palo Verde and Cibola valleys. It was conflicting. The defendants' witnesses, all of them interested, testified as to the possibility of damages by reason of raising the water level in the river to such an extent that it would overflow and would also raise the water table under the lands in the said valleys, causing the same to be waterlogged, and plaintiff's witnesses, also interested, were quite as positive that no damage could possibly result to the said valleys. The Gault report referred to the possibility of damages to said valleys, but no definite finding was made. In view of the conflict and of the failure of either side to produce a fair preponderance of the evidence, the court will find that no such damage will result.

Assuming, however that the court could find that damage to the said valleys would result or that there was a possibility thereof, it was not necessary that reference be made thereto in the notice of election or upon the ballot, and such reference, even if made, would be of no practical value to

the voters in indicating the amount of liability they might be assuming, owing to the impossibility of estimating the amount of such damage, if any, even in the remotest degree. As to this question, the finding will be that the notice of election and the ballot were in accord with the statute. The evidence upon this question was properly received and the notion to strike should be denied.

(b) *Use of Water not Limited by Reclamation Law.* Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, thus preventing him from obtaining water for all of his land, that he will be required to pay water assessments upon all of his land but will be able to get water for only 160 acres, and that the contract takes from him, without compensation, his water right for all of his land in excess of 160 acres.

The water right of neither the defendant Melan nor of any other person in the Imperial Irrigation District may be taken by the district or by the government without compensation. Furthermore, section 5 of the Reclamation Law does not apply in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. Section 1 of the Boulder Canyon Project Act provides that the expenditures for the main canal and appurtenant structures shall be "reimbursible, as provided in the Reclamation Law", and in section 4(b) it is required that before any money is appropriated for the construction of the main canal and appurtenant structures, the secretary shall make provision for revenues adequate in his judgment to secure payment of all expenses of construction, operation, and maintenance "in the manner provided in the Reclamation Law". Section 14 provides that the Boulder Canyon Project Act "shall be deemed a supplement to the Reclamation Law, which said Reclamation Law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided". The act

does not adopt the Reclamation Law or any of its provisions, except as above stated, and the authority of the secretary with reference to the delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the secretary to contract for the delivery of water "under such general regulations as he may prescribe" and provides that "contracts respecting water for irrigation and domestic uses shall be for permanent service". Article 30 of the contract reads as follows: "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder". There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered.

(c) *Opening Public Lands to Entry.* Counsel for defendants assail that portion of Article 23 of the contract which provides that within a reasonable time, to be determined by the secretary, from the date water is available for public lands within the district, such lands shall be opened to entry. Counsel assert that the secretary is without power to make such an agreement for the reason that the disposition of public lands is within the power of Congress. That Congress has the power to dispose of public lands and to make needful rules and regulations therefor is not disputed, and without authority of Congress the secretary would have no power to agree as to the opening of public lands to entry or other disposition thereof. Congress exercised its power over the public lands in the district and gave the necessary authority to the secretary in Section 9 of the Boulder Canyon Project Act, wherein it is enacted that all public lands found by the secretary to be practicable of irrigation and reclamation by the irrigation works authorized by the act shall be withdrawn from public entry, and that thereafter, at the discretion of the secretary, such lands shall be opened for entry in accordance with the provisions of the reclamation law.

Congress having exercised its authority to provide for the disposal of public lands as provided in said section 9, and having by the same statute authorized the execution of the contract now under consideration, and the Secretary,

pursuant to such authority, having agreed with the district, as a part of the consideration for the contract, that he will open the lands for entry when water is available therefor, the contract has become a binding obligation upon the United States.

(d) *Secretary's Veto of Change of Boundaries.* Article 11 of the contract provides that after the date of the contract no change shall be made in the boundaries of the district unless and until the secretary shall assent to such change in writing. It is claimed by the defendants that the foregoing provision renders the contract void because it takes from the district and the board of directors thereof a power which is theirs exclusively under the Irrigation District Act and reserves to the secretary the right to determine whether territory now in the district shall be excluded therefrom and whether new territory shall be included therein.

This provision of the contract is in accord with section 3 of the 1917 act, which has been fully covered in the discussion of the claimed delegation of legislative powers and need not be repeated here. If the statute is constitutional, the contract is valid. Having determined the former, the latter must necessarily follow.

(e) *Power Possibilities Reserved.* By a contract between the United States and Imperial Irrigation District dated October 23, 1918, for the consideration therein named, the District was given certain rights to divert water from the Colorado River at Laguna Dam, which dam was recited in the contract to have been constructed by the United States in connection with the Yuma project, including land in both Arizona and California. Development and disposition of power is covered by the said contract.

Article 14 of the contract under consideration in the present proceeding provides that as one of the considerations for the partial termination of the contract of October 23, 1918, as provided for in Article 16 of the contract, the power possibilities on the All-American Canal, down to and including Syphon Drop, with water carried for the benefit of the Yuma project, are reserved to the United States.

Other power possibilities upon the canal are given to the district subject to the participation by other agencies as provided for in another portion of the contract which provides for increasing the capacity of the works for other agencies without additional cost to the district. This provision is not in violation of the Boulder Canyon Project Act. By Section 7 thereof the districts or other agencies contributing to the cost of the canal and other works are given the privilege of utilizing, by contract or otherwise, the power possibilities in proportion to their respective contributions or obligations toward the capital cost. By this provision of the contract the district is now agreeing to the use of a portion of the power that may be developed upon the canal, but only as to that portion of the power that may be generated with the water carried for the benefit of the Yuma project. The power generated by the district's portion of the water is not affected by the contract.

As to the participation by other agencies in the power, we think the contract is quite clear that each agency will have the benefit of the power generated by the water belonging to such agency. Article 21 of the contract reserves the right to the United States to increase the capacity of the works and to contract for such increased capacity with other agencies for the delivery of water for use in the United States, but it is expressly declared that such other agencies shall not thereby be entitled to participate in power development on the canal except at points where and to the extent that the water diverted and carried for such agencies contributes to the development of power. The contract plainly provides for a division of the power generated by water flowing through the canal in the proportion that the right to use the water is acquired by such agencies.

(f) *Works for the Benefit of the Yuma Project.* Article 15 of the contract sets forth that as a further consideration for the partial termination of the said contract of October 23, 1918, as provided in Article 16, the district agrees to divert at the Imperial Dam and to transport and deliver at certain points on the canal, the available water to which the Yuma project is entitled, not exceeding 2,000 second-

feet, for the use and benefit of said Yuma project; such diversion, transportation and delivery to be without expense to the United States as to capital investment required to provide facilities for such diversion and transportation.

It is claimed that this provision is without consideration and renders the contract void because, a portion of the Yuma project being in the State of Arizona, this requirement will entail an expense to the district for the benefit of lands outside of the State of California, and there is no provision in law authorizing the levying of assessments upon land in California irrigation districts for the benefit of lands in another state.

Not only is a good and sufficient consideration for a written contract presumed (C.C.P. 1963, subd. 39), but the same is expressed in the contract as above stated, and in Article 16 of the contract provision is made for partially terminating the said contract of October 23, 1918.

Section 1 of the 1917 act authorizes irrigation districts to cooperate with the United States, under any act of Congress permitting such cooperation, for the acquisition, operation or maintenance of constructed works or for a water supply, and Section 15 of the Irrigation District Act authorizes the board of directors of an irrigation district to do any acts necessary or proper for the performance of agreements with the United States for the joint acquisition, etc., of any rights, works, or other property which may be lawfully acquired or owned by an irrigation district. Both the authority and the consideration are sufficient to sustain this portion of the contract.

(g) *Not Required to Build Canal to Coachella Valley.* Section 1 of the Boulder Canyon Project Act authorizes the Secretary of the Interior to construct a main canal connecting the diversion dam with Imperial and Coachella Valleys, but his power is restricted by Section 4(b) which provides that before any construction work is done upon the canal or contracted for, the secretary shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all charges for construction, operation and maintenance of the canal. The statute au-

thorizes, but does not require, the building of the canal to both Imperial and Coachella Valleys, or to either one of them, and the authority given is conditioned upon a contract which will insure payment to the United States of its entire expenditure. If one valley, no matter which, executes a contract sufficient in the judgment of the secretary to insure payment of the cost of construction, the secretary is authorized to construct the canal to that valley without the concurrence of the other. It was never intended that the refusal of one valley to enter into a contract would prevent the other from so doing. There is nothing in the Boulder Canyon Project Act preventing the secretary from entering into a separate contract with the duly constituted authorities of each valley.

Strange, indeed, would it be to construe the statute as meaning that a contract executed by the secretary pursuant to this statute must be one that is satisfactory to both valleys, and that if they failed to agree upon all terms and conditions neither one could have the benefit of the canal. Here the contract is satisfactory to Imperial Valley, as indicated by these proceedings which are brought by the Imperial Irrigation District to have the same validated by this court, and by the approval of the contract by an overwhelming vote of the electors of the district. The fact that Coachella Valley and the owners of property therein are not content with the contracts as certainly evidenced by the effort of the Coachella Valley County Water District and its codefendants to prevent such validation. The situation could be as easily reversed. A contract with which Coachella Valley was content might be before the court with as forcible opposition from Imperial Valley. In either event, if this were a joint or cooperative enterprise requiring approval of the contract by both valleys, an impasse might exist which would forever preclude the construction of a canal to either valley.

We have already discussed the inapplicability of the Reclamation Law to this proceeding except as the same is made so by the express terms of the Boulder Canyon Project Act. The statute does not require a unit construction. Neither the statute nor this contract deprives Coachella Valley, or any of the property owners therein, of any right

to the construction of a canal into that valley under such terms as may be arranged with the United States, or of any right that now exists or that may hereafter be acquired to the waters of the Colorado River, or to the use thereof.

(h) *Collection of Assessments by Coachella District.* Defendants claim that the contract is void in that it provides in Article 10(e) that if the lands now or hereafter within Coachella Valley County Water District are included within the Imperial Irrigation District, Coachella District shall have the privilege, at its option, of paying to the Imperial District the amount of annual and special assessments levied by the Imperial District upon the lands in the Coachella District, asserting that this is in violation of the irrigation district law which requires the collection of assessments by the district collector. Article 10(e) of the contract provides that the Coachella District shall have the privilege of making such payments "if, as and when authorized to do so by law". If the Coachella District is not now authorized by law to collect assessments and pay the same to the Imperial District, the contract does not authorize it to do so and it will not have such power until the law is amended so as to permit such action on its part. This provision of the contract, by its own terms, is not effective unless now authorized by law or unless authority shall hereafter be conferred by law.

(i) *Plans and Specifications.* It is claimed that the contract is void because it does not refer to any plans or specifications pursuant to which the work is to be constructed. Article 7 of the contract provides that the United States will construct the dam and the All-American Canal and appurtenant structures at the approximate locations shown upon a map which is made a part of the contract. The canal is to be of a capacity specified in the contract to a certain point, and other portions of the canal are to be of such capacity as the secretary may determine "to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract", and the secretary is further given power to change capacities, locations, lengths, and alignments during the progress of the work when in his opinion the same may be expedient, economical, necessary or advisable. The ultimate cost to

the district of the entire works to be constructed is limited to $38,500,000.

This is not a construction contract wherein detailed plans and specifications are required. The contract requires the construction of a main canal sufficiently large to carry the required amount of water for the irrigation of the lands to be served thereby. In view of the fact that the district may or may not be enlarged, depending upon the desire of the owners of property which is not now within the district, it was obviously necessary that the secretary be given discretion to make changes as to capacity, location, etc., of the canal.

(j) *Capital Cost.* Another defect claimed by defendants is that no estimate of the capital cost of the dam, canal and other works has been made, which counsel claim is in violation of the requirement of Section 4 of the Reclamation Law that when the secretary determines that an irrigation project is practicable he may cause contracts to be let for the construction of the same and that thereupon he shall give public notice of the charges which shall be made per acre upon the lands which may be irrigated by the waters of the irrigation project. This is not an "irrigation project" and the said provision of the Reclamation Law has no application to the present proceeding. We have heretofore referred to this question. Neither the 1917 act nor the Boulder Canyon Project Act requires an estimate of the capital cost to be given in any manner different from that which appears in the contract itself as a limitation of the maximum amount to be paid by the district.

(k) *Claims of the United States.* Article 35 of the contract reads: "Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured". This comports with Section 17 of the Boulder Canyon Project Act. The statute and the contract can mean nothing more than that claims of the United States are paramount to private claims, and there is no attempt to create a lien upon the land in the district or to give the United States priority over tax and assessment liens or bondholders' claims. Neither the United States by statute, nor the United States and the District by contract,

may set aside or interfere with the taxing power of the state. The court will not construe the statute to mean that Congress attempted thereby to do something which it had no power to do unless such meaning is unmistakable. But nor will the court presume that Congress knew the limitation of its authority and did not intend by the statute to accord to the United States any greater right than could lawfully be bestowed.

(l) *Units and Benefits.* Section 7 of the 1917 act provides that assessments required to meet the payment due to the United States for all purposes under the contract may be apportioned in accordance with the benefits. The constitutionality of this provision has already been determined.

The act further provides that in the ascertainment of such benefits there shall be taken into account, among other things, the provisions of the contract between the United States and the district. The contract here provides that the district shall be divided into units by the board of directors of the district and that the lands within each unit will be benefited by the works to be constructed under the contract in the proportion that the area within such unit bears to the total area of the district. These provisions of the contract are to be taken into account in the ascertainment of the benefits, along with the other parts thereof. Construing articles 10 and 34 of the contract together, every right that the property owners previously have had under the law is preserved to them. They are not deprived of anything either by the statute or by the contract. The contract has been approved by the presently constituted district at the election held for that purpose. All private lands that are hereafter annexed to the district must come in by petition, after notice and hearing, and the conditions of annexation, including benefits, are determined after a bearing. If the people are not satisfied with the conditions named, they need not become a part of the district. Section 34(b) of the contract is explicit in preserving all rights and remedies of property owners. As to public land in the territory that may be annexed to the district, the Secretary of the Interior has consented to its annexation and to its assessment upon the conditions and in the manner set forth in the contract.

(m) Other minor objections are made to parts of the contract, none of which affect the validity thereof or warrant an extended discussion.

6. ORDERS TO BE ENTERED.

In accord with the conclusions reached, the following orders will be entered:

(a) *In the Validation Case:* The demurrer of Coachella Valley County Water District to the complaint is overruled; the motion to consolidate with the Malan case is denied; the several motions of plaintiffs to strike out evidence are denied; findings and judgment will be entered that the contract and all proceedings leading up to the execution of the same are valid in all particulars.

(b) *In the Malan Case:* The plaintiff's motion for a temporary injunction is denied; the defendants' demurrer to the complaint is sustained without leave to amend; judgment will be entered in favor of the defendants without prejudice, however, to any defense that plaintiff Malan has made or that he may hereafter make as a defendant in the Validation Case; the motion to consolidate with the Validation Case is denied.

Dated May 24, 1933.

/s/ EMMETT H. WILSON
Judge.

APPENDIX F: Extracts of Applicable Statutes

Appendix F-1: Boulder Canyon Project Act, 45 Stat. 1057.

[SEC. 1.[1]] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete

1. Codified as 43 U.S.C. § 617.

plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

SEC. 2.[2] (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

2. Codified as 43 U.S.C. § 617a.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amounts so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3.[3] There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

SEC. 4.[4] (a). This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

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3. Codified as 43 U.S.C. § 617b.

4. Codified as 43 U.S.C. § 617c.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its

tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses

of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

SEC. 5.5 That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the

5. Codified as 43 U.S.C. § 617d, with amendment not material here.

sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy

expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other

agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

SEC. 6.[6] That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to

6. Codified as 43 U.S.C. § 617e, with amendment not material here.

comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

SEC. 7.[7] That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

7. Codified as 43 U.S.C. § 617f.

SEC. 8.[8] The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

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8. Codified as 43 U.S.C. § 617g.

SEC. 9.[9] That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction costs of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who have served in the United States Army, Navy, or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, page 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this Act: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

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9. Codified as 43 U.S.C. § 617h, with amendment not material here.

SEC. 10.[10] That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11.[11] That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12.[12] "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the con-

10. Codified as 43 U.S.C. § 617i.

11. Codified as 43 U.S.C. § 617j.

12. Codified as 43 U.S.C. § 617k, with amendment not material here.

struction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

SEC. 13.[13] (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed

13. Codified as U.S.C. § 617*l*, with amendment not material here.

or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

SEC. 14.[14] This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15.[15] The Secretary of the Interior is authorized and directed to make investigation and public reports of

14. Codified as 43 U.S.C. § 617m.

15. Codified as 43 U.S.C. § 617n.

the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16.[16] In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17.[17] Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18.[18] Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

16. Codified as 43 U.S.C. § 617o.

17. Codified as 43 U.S.C. § 617p.

18. Codified as 43 U.S.C. § 617q.

SEC. 19.[19] That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20.[20] Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21.[21] That the short title of this Act shall be "Boulder Canyon Project Act."

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19. Codified as 43 U.S.C. § 617r.

20. Codified as 43 U.S.C. § 617s.

21. Codified as 43 U.S.C. § 617t.

Appendix F-2: Extracts from Reclamation Act of 1902, 32 Stat. 388.

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

[SEC. 1.[22]] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided,* That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an

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22. Codified in relevant part in 43 U.S.C. § 391, with amendment not material here.

Act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 3.[23] That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purpose of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

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23. Codified as 43 U.S.C. §§ 416, 432, and a portion of 434.

SEC. 4.[24] That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands, in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5.[25] That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until

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24. Codified as 43 U.S.C. §§ 419 (with amendment not material here) and 461.

25. Codified in relevant part as 43 U.S.C. §§ 431, 439.

all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

SEC. 8.[26] That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 10.[27] That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

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26. Codified as 43 U.S.C. §§ 372, 383.

27. Codified as 43 U.S.C. § 373.

Appendix F-3: Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649.[28]

SEC. 46. No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the

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28. Codified as 43 U.S.C. § 423e, with amendment not material here.

construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.

Appendix F-4: Reclamation Extension Act of 1914, 38 Stat. 689.[29]

SEC. 12. That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the project if adopted for construction.

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29. Codified as 43 U.S.C. § 418.

Appendix F-5: Colorado River Compact,
Signed at Santa Fe, N. Mex., November 24, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the act of the Congress of the United States of America approved August 19, 1921 (42 Stat. L., p. 171), and the acts of the legislatures of the said States, have through their governors appointed as their commissioners: W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, jr., for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies, and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends, the Colorado River Basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River system is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II

As used in this compact:

(a) The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied.

(c) The term "States of the upper division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the lower division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River 1 mile below the mouth of the Paria River.

(f) The term "upper basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River system above Lee Ferry and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.

(g) The term "lower basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which

shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depicted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the 1st day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water which can not reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their governors, may give joint notice of such

desire to the governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

Priority: (a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey, shall cooperate, ex officio —

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lees Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) With respect to the waters of the Colorado River system not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State, the governors of the States affected, upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Perfected rights. — Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River system shall be satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the legislatures shall be given by the governor of each signatory State to the governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the governors of the signatory States of approval by the Congress of the United States.

In witness whereof the commissioners have signed this compact in a single original, which shall be deposited in

the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the governor of each of the signatory States.

Done at the city of Santa Fe, N. Mex., this 24th day of November, A. D. 1922.

W. S. NORVIEL.
W. F. MCCLURE.
DELPH E. CARPENTER.
J. G. SCRUGHAM.
STEPHEN B. DAVIS, JR.
R. E. CALDWELL.
FRANK C. EMERSON.

Approved.

HERBERT HOOVER.

Appendix F-6: Extract from California Irrigation District Act of 1917, 1917 Cal. Stat. 243, 245.

SEC. 3. Any proposal to enter into a contract with the United States for the repayment of construction moneys, the cost of a water supply or the acquisition of property, and to issue bonds, if any be proposed, shall be voted upon at an election wherein proceedings shall be had in so far as applicable in the manner provided in the case of the ordinary issuance of district bonds. Said proposal, with such plans and estimates of cost as have been made in connection therewith, shall be submitted to the state engineer for his examination and report, and the proceedings in that regard shall be in accord with section thirty of the act approved March 31, 1897, as amended, in so far as the same may be applicable. Notice of the election herein provided for shall contain in addition to the information required in the case of ordinary bond election a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property, if any, to be conveyed by the district as hereinabove provided. The ballots at such election shall contain a brief statement of the general purpose of said contract and the amount of the obligation to be assumed, as aforesaid, with the words "Contract — Yes" and "Contract — No," or "Contract and bonds — Yes" and "Contracts and Bonds — No," as the case may be. The board of directors may submit any such contract or proposed contract and bond issue if any, to the superior court of the county wherein is located the office of said board to determine the validity thereof and the authority of the board to enter into such contract, and the authority for and validity of the issuance and deposit or transfer of said bonds; whereupon the same proceedings shall be had as in the ordinary case of the judicial determination of the validity of bonds and with like effect.

Appendix F-7: Extract from California Irrigation District Act of 1897, 1897 Cal. Stat. 254, 276.

SEC. 68. The board of directors may, at any time after the issue of any bonds or the levy of any assessment herein provided for, bring an action in the Superior Court of the county wherein is located the office of such board, to determine the validity of any such bonds or such levy of assessments; such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in some paper of general circulation published in the county where the action is pending, such paper to be designated by the court having jurisdiction of the proceedings. Jurisdiction shall be complete within ten days after the full publication of such summons in the manner herein provided. Any one interested may at any time before the expiration of said ten days appear and by proper proceedings contest the validity of such bonds or assessments. Such action shall be speedily tried and judgment rendered declaring such matter so contested either valid or invalid. Either party may have the right to appeal to the Supreme Court at any time within thirty days after the rendition of such judgment, which appeal must be heard and determined within three months from the time of taking such appeal.

Appendix F-8: 28 U.S.C. § 1738.

1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Supreme Court, U. S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, *et al.*,
Petitioners,

—v.—

BEN YELLEN, *et al.*,
Respondents.

No. 79-425

STATE OF CALIFORNIA
Petitioner,

—v.—

BEN YELLEN, *et al.*,
Respondents.

No. 79-435

IMPERIAL IRRIGATION DISTRICT,
Petitioner,

—v.—

BEN YELLEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 14, 1979
CERTIORARI GRANTED DECEMBER 3, 1979

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THE SECRETARY OF THE INTERIOR
Washington

February 24, 1933

Imperial Irrigation District,
El Centro, California

Gentlemen:

Information at hand indicates that in connection with the contract with your district signed by me on behalf of the United States under date of December 1, 1932, some question has been raised concerning the maximum area of land in single ownership that may be irrigated from the proposed All-American Canal. My attention has been specifically called to the suit now pending in the Superior Court of Imperial County, California entitled Charles Malan *v.* Imperial Irrigation District et al. Among other things the complaint in this case contains the following allegation:

> "And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land."

The foregoing is an inaccurate statement of the reclamation law in this respect. Presumably this allegation is intended to refer to section 5 of the reclamation act of June 17, 1902, which reads in part as follows:

> "No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made." (Emphasis supplied).

It will be recalled that while the reclamation law provides that no water shall be *sold* for a tract of land in excess of 160 acres in single ownership, it does not provide, as alleged,

that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area.

The All-American Canal contract with the Imperial Irrigation District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

> *"Provided, however,* that no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys."

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L. D. 351; Anna M. Wright, 40 L. D. 116). On many projects it has been

the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

The provision quoted from section 5 of the reclamation act relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Act and Act of June 27, 1906, 34 Stat. 519).

The foregoing has been long settled by decisions of the Department and by the practice in carrying such decisions into effect.

Sincerely yours,

/s/ RAY LYMAN WILBUR
Secretary.

March 1, 1933

Richard J. Coffey, Esquire,
608 Grant Building
Los Angeles, California

Dear Mr. Coffey:

In your telegram of February 28 from Phoenix relating to the All-American Canal contract you requested that Mr. Childers be furnished with a certified copy of the Department's ruling on the 160-acre limitation. When your telegram was sent you no doubt assumed that this ruling would take the form of a formal decision. This, however, is not the case. It was decided that the matter should be passed upon in a letter addressed by the Secretary to the Imperial Irrigation District. This letter was dated February 24 and I understand the original has been forwarded by Messrs. Du Bois and Dowd to Mr. Childers. If the letter is to be used in the case under the well-known rule a certified copy could not be used until satisfactory explanation is made of failure to produce the original. A certified copy, therefore, presumably, would serve no useful purpose and accordingly is not being furnished.

Messrs. Du Bois and Dowd were in the office this morning and exhibited a telegram received by them from Mr. Childers, who in his telegram indicated that the situation is not fully met in that the discussion relates to the 160-acre limitation in the reclamation act, whereas they are apprehensive concerning the act of May 25, 1926, presumably Section 46. You will recall that this is a matter which was very extensively discussed. You and I were of the opinion that some specific provision should be inserted regarding this acreage limitation and the original draft of contract so provided. However, representatives of the district entertained the fear that should a specific provision be inserted in the contract it would only be confusing and make the ratification by the landowners more difficult. In my view the acre principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act,

involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect.

The Secretary's letter was directed to the specific allegations in the complaint, which, so far as could be ascertained, had no direct reference to the act of May 25, 1926. I assume, however, that regardless of the allegations in the complaint, Mr. Childers is apprehensive that argument may be submitted based upon the 1926 act. If this is done it seems to me the defense would necessarily be based upon the propositions, first, that the All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and that this stands upon a basis quite different from the ordinary conception of a project. The second proposition is that the acreage limitation in the reclamation law (including section 46 of the act of May 25, 1926) does not apply to the lands having a vested right. This is the ground upon which you and I with reluctance agreed to elimination of the specific provision regarding acreage limitation.

Section 14 of the Boulder Canyon Project Act provides that it shall be deemed a supplement to the reclamation law, which shall govern the construction, operation and maintenance of the works authorized except as otherwise provided in that act. The specific provisions of the Boulder Canyon Project Act are therefore controlling. Section 4(b) of this act provides that contracts for repayment of costs shall be made before any money is appropriated or construction started. Section 46 of the act of May 25, 1926 contains an entirely different provision in this respect. This section does not require a contract in advance of appropriation of money or construction but does require a contract of the character described before water is delivered. Section 46 is of general application and of course contemplates a case where a project is being constructed from which a new and complete water right will be sold and where a distribution system is constructed and water deliveries made through it. The special conditions in the Imperial and Coachella Valleys were known to Congress, and I believe some consideration was given to incorporating a special provision

regarding the acreage limitation, though my memory in this respect is not entirely clear. Mr. Childers probably may recall what was contemplated and the reasons for no specific provision being inserted in this respect.

I hope the outcome of litigation will be satisfactory.

Sincerely yours,

/s/ Porter W. Dent
Assistant Commissioner.

M-36675 *December 31, 1964*

To: Secretary of the Interior

Subject: Excess Land Laws: Imperial Irrigation District

On August 7, 1961, the Chairman of the Senate Committee on Interior and Insular Affairs reported that complaints had been made that the excess land laws were not being enforced by the Bureau of Reclamation in Imperial and Coachella Valleys in California. He requested advice as to whether the excess land laws applied there, and if so what the status of land ownership was.[1]

You replied on May 15, 1962, stating that lands in Coachella Valley County Water District are subject to, and in compliance with, the excess land laws. You indicated, however, that while Secretary Wilbur in 1933 had ruled that the excess land laws do not apply to Imperial Irrigation District, there is some reason to suggest he may have been mistaken. You expressed the hope that time and staff would permit a study of this matter in the future.[2]

This question arose again at the Senate hearings on S. 1658 last April when Senator Kuchel of California asked if the excess land laws apply under the Boulder Canyon Project Act. The Senator stated that the question was, in his view, an important one.[3]

You have therefore asked me as Solicitor to make a careful study of the problem and advise you. After consideration of all issues I have concluded that, as a matter of law, the excess land laws do apply to lands in the Imperial Irrigation District.

The Imperial Irrigation District embraces about 530,000 irrigable acres of desert land in Southern California.

1. Letter from Senator Clinton P. Anderson to Secretary Udall, August 7, 1961. See Appendix L.

2. Letter from Secretary Stewart L. Udall to Senator Anderson, May 15, 1962. See Appendix M.

3. *Hearings on S. 1658 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs,* 88th Cong., 1st Sess., pt. 2, at 349-351 (1964).

Approximately 430,000 acres are now irrigated by Colorado River water which is stored at Hoover Dam and diverted at Imperial Dam to the All-American Canal for distribution within the District. The Hoover and Imperial Dams and the All-American Canal are federal projects authorized by the Boulder Canyon Project Act (the act of December 21, 1928, 45 Stat. 1057, 43 U.S.C. secs. 617-617t).

The federal government did not construct and does not own the system of canals and laterals through which water is distributed to individual farms after its discharge from the All-American Canal.

If the land limitation provisions of the reclamation law (herein sometimes referred to as the excess land laws) apply to privately owned lands in the Imperial Irrigation District, it is by virtue of terms of the Boulder Canyon Project Act.

Section 9 of the Project Act expressly applies the 160 acre limitation to public lands in the project. Hence, we are only concerned here with privately owned lands. Since Secretary Wilbur's ruling was limited to lands then irrigated from the Colorado River, this opinion considers lands to which an antecedent water right was assumed to be appurtenant. Thus, the question considered here is: Are privately owned lands in the Imperial Irrigation District, assuming they have appurtenant water rights, subject to the excess land laws?

Boulder Canyon Project Act

Section 1 of the Act states the purposes of the project, and authorizes the construction of a storage dam on the Colorado River and of a diversion dam and main canal to divert water to the Imperial and Coachella Valleys in California. While Section 1 provides that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys * * *," it also requires that the "expenditures for * * * [the] main canal and appurtenant structures [are] to be reimbursable, as provided in the reclamation law * * *." Since Congress does not purposely enact contradictory provisions in the same act, we must conclude that reimbursement for the main canal and appurtenant structures was not regarded by Congress as a charge for water or for its use, storage or delivery.

Section 4(b) of the Act outlines the terms under which the United States will be repaid for its investment. With respect to the "* * * main canal and appurtenant structures to connect * * * with the Imperial and Coachella Valleys in California * * *," the Secretary is instructed to "make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance * * * in the manner provided in the reclamation law."

Finally, section 14 of the Project Act reads as follows:

> This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Section 1 provides that the expenditures for the construction of the main canal and appurtenant structures are to be reimbursable "as provided in the reclamation law." Section 4(b) requires that the United States be repaid its expenses for construction, operation, and maintenance "in the manner provided in the reclamation law."

The Act defines, "reclamation law" in section 12 as "that certain Act of the Congress of the United States approved June 17, 1902 * * * and the Acts amendatory thereof and supplemental thereto."

On December 21, 1928, the date of the Project Act, and on June 25, 1929, the date when it became effective, the law prescribing the manner by which repayment was to be made for reclamation projects was section 46 of the Omnibus Adjustment Act of 1926 (act of May 25, 1926, 44 Stat. 649-50, 43 U.S.C. sec. 423e). Section 46 provides that no water is to be delivered[4] upon completion of "any new project"

4. The Project Act in Sec. 4(b) modifies this to provide that "[b]efore any money is appropriated * * * " the Secretary must make adequate provision for repayment.

until repayment contracts have been entered into with irrigation districts organized under State law. Section 46 further requires that:

> * * * Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior * * *.

The conclusion is inescapable, therefore, that the law, on December 21, 1928, required that the excess land laws apply to the Imperial Irrigation District.

This conclusion is reinforced by section 14 which provides that reclamation law "except as otherwise herein provided" shall govern "the construction, operation, and management" of the project works.

The provisions of reclamation law of general application dealing with land limitations include section 5 of the 1902 Act,[5] Sections 1 and 2 of the Warren Act,[6] Section 3 of the 1912 Act,[7] Section 12 of the 1914 Act,[8] and Section 46 of the 1926 Act, *supra*.

Section 5 of the 1902 Act forbids the sale of a water right for lands in private ownership for more than 160 acres. The "sale" can only be understood in the context of sections 4 and 5 of the Act. A reading of the two sections together

5. Act of June 17, 1902, 32 Stat. 388, 389, 43 U.S.C. § 431.

6. Act of February 21, 1911, 36 Stat. 925-26, 43 U.S.C. § 523-24.

7. Act of August 9, 1912, 37 Stat. 265, 266, 43 U.S.C. § 544.

8. Act of August 13, 1914, 38 Stat. 686, 689, 43 U.S.C. § 418.

reveals that the sale is not merely a commercial transaction involving the transfer of a water right. It is the contract by which the government secures repayment and the water user obtains the range of benefits resulting from the construction of the federal project.

In section 4 the Secretary is directed to estimate and announce the per-acre charge and the number of annual installments. This is his estimate of the consideration to be paid by the water user for the sale referred to in section 5. When section 5 states "no right to the use of water for land in private ownership shall be *sold*" for more than 160 acres, it obviously means that the use of project facilities shall not be made available to a single owner for service to more than 160 acres.

The owner of private land may also own a water right. Clearly a water right will not be sold, in the conventional sense, to such an owner.

Sections 4 and 5 disclose a scheme by which all participants in a project share its cost. If a private landowner cannot be sold a water right because he already owns one, he cannot be charged for it either and, since section 5 contains all the provisions of the Act for repayment, there is no way by which he can participate in the project.

Nothing in the 1902 Act or its legislative history suggests that private landowners with water rights could participate in a project, pay their share of its cost, but be exempt from acreage limitation.

In 1911, in the Warren Act, *supra*, Congress dealt directly with the situation where federal facilities may store or carry water owned by others. The use of federal facilities under the Warren Act is expressly conditioned on compliance with the excess land laws.

Section 3 of the 1912 Act provides that water shall not be "furnished under said [reclamation] act nor a water right sold or recognized for such excess" over 160 acres. Here is manifested in the clearest manner possible that the ownership of a water right prior to the construction of a

federal reclamation project would not entitle its owner to service from the federal land project for more than 160 acres.

The 1914 Act, *supra,* extended the time for repayment under the 1902 Act and made other changes in the reclamation law. Repayment by private landowners was effected as before, by the making of a water right application and the "sale" (in the sec. 5 sense) of a water right.

However, Section 12 of the 1914 Act provided that any owner of lands in excess of what should be determined to be sufficient to support a family could not be included in the project unless he agreed to sell his excess lands. Thus, as applied to the lands under the All-American Canal, the 1914 Act would require the landowners to agree to sell excess lands or not get any water through the Canal at all. When stated this way no distinction is possible between a landowner with and a landowner without a water right. Neither could get in the project without making the prescribed agreement.

The Act of May 15, 1922 (42 Stat. 541, 43 U.S.C. sec. 511), authorized joint liability contracts with districts in lieu of individual water-right applications. Section 46 of the Act of May 25, 1926, *supra,* made joint liability contracts mandatory for new projects. Such was the contract entered into with Imperial Irrigation District.

By Section 46 the mechanism of repayment by "selling" water rights to private landowners disappeared and was replaced by an undertaking by the district to repay construction charges.

The Project Act differed from section 46, which required a repayment contract before water was delivered to the district, by requiring, in section 4(b), the contract "before any money is appropriated." That this was the only change intended, and that section 46 was otherwise applicable, is clear from the section 4(b) requirement that repayment is to be effected "in the manner provided by the reclamation law."

"The manner provided by the reclamation law" on the effective date of the Project Act was section 46 of the 1926

Act. As already pointed out, section 46 required the application of the excess land laws in all cases where repayment contracts, such as the Imperial Irrigation District contract, were to be made.

In *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958), the Court considered the validity of contracts of the United States with irrigation districts made pursuant to the act authorizing the Central Valley Project (Act of August 26, 1937, 50 Stat. 850, as amended by the Act of October 17, 1940, 54 Stat. 1199). The contracts were challenged as invalid because they contained acreage limitation provisions. The Court held the contracts to be valid and authorized by Congress. The only provisions in the authorizing legislation which invoke the reclamation law are the third proviso of Section 2 of the 1937 Act, which provides, in part, as follows:

> * * * except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project * * *.

and section 2 of the 1940 Act, which adds authority to construct distribution systems "under the provisions of the Federal reclamation laws." The language in each instance is substantially the same as the language of the Boulder Canyon Project Act.

The Supreme Court in *Ivanhoe* declare that "* * * the authority to impose the conditions of the contracts here comes from the power of Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements [i.e. compliance with the excess land laws] * * *. [I]f the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts." *Ibid.* at 291. In describing the effect of the excess land laws the Court said, "* * * the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed." *Ibid.* at 297.

Legislative History

The plain terms of the Project Act dictate that the excess land laws apply to lands served by the All-American Canal, Imperial Dam and appurtenant structures. After a thorough examination of the history of the Project Act itself and of legislative consideration of the bills which preceded it,[9] I have found no inference of congressional intent to exempt said lands from the excess land laws. As pointed out in *Ivanhoe,* "* * * where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." *Supra* at 292.

The Boulder Canyon Project Act was the enactment of the last of a series of Swing-Johnson bills. The fourth, and final, Swing-Johnson bill was introduced in the House as H.R. 5773 on December 5, 1927, and in the Senate as S. 728 on the following day.[10]

Unlike its predecessors,[11] the House version of the bill contained an express acreage limitation proviso covering private lands. The proviso was substantially identical with the excess land provision of section 46, Omnibus Adjustment Act of 1926.[12]

9. H.R. 6044, 66th Cong., 1st Sess. (1919); H.R. 11553, 66th Cong., 2d Sess. (1920); H.R. 11449, 67th Cong., 2d Sess. (1922); H.R. 2903 and S. 727, 68th Cong., 1st Sess. (1924); H.R. 6251, S. 1868, H.R. 9826, and S. 3331, 69th Cong., 1st Sess. (1926); H.R. 5773 and S.728, 70th Cong., 1st Sess. (1927).

10. 70th Cong., 1st Sess.

11. H.R. 11449, 67th Cong., 2d Sess. (1922); H.R. 2903 and S. 727, 68th Cong., 1st Sess. (1924); H.R. 6521, S. 1868, H.R. 9826, and S. 3331, 69th Cong., 1st Sess. (1926).

12. On February 5, 1926, Elwood Mead, Commissioner of Reclamation, testified during the hearings on H.R. 6251 and H.R. 9826 (third Swing-Johnson bill) before the House Committee on Irrigation and Reclamation that "old land," i.e., land already irrigated, "would be sold water under a Warren [Act] contract" and that the owners thereof would be allowed to occupy their then existing farm units, irrespective of the acreage involved. On the same occasion Congressman Swing affirmed that nothing in the third Swing-Johnson bill required owners of land in excess of 160 acres to sell that excess at a price set by the Secretary. *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., pt. 1, at 32-33 (1926). These statements were made prior to the enactment of section 46 of the Act of May 25, 1926, and hence are not relevant to the Interpretation of the Project Act finally enacted. Moreover, Dr. Mead's statement was based on an erroneous understanding of the then existing reclamation law. The All-American Canal project was not a project of the character considered in the Warren Act of 1911 (36 Stat. 925). Had it been, the terms of that Act would have precluded the delivery of water to more than 160 acres of private land in a single ownership. In addition, both Dr. Mead and Mr. Swing overlooked section 12 of the Reclamation Extension Act of 1914 (38 Stat. 689), which was a reclamation law of general applicability then in effect. Section 12 required that owners of private excess lands agree to dispose of them before they could participate in a project. Both H.R. 6251 and H.R. 9826 incorporated the reclamation law by reference.

In contrast to the House bill, the Senate version of the fourth Swing-Johnson measure, S. 728, included no specific provision on acreage limitation relative to private lands. A bill introduced by Senator Phipps of Colorado, S. 1274, contained language similar to the Section 46 excess land provision,[13] and the Senate Committee on Irrigation and reclamation considered both S. 728 and S. 1274 in its hearings.[14] The Phipps bill never emerged from the Committee, whereas the Swing-Johnson measure was favorably reported.[15]

According to the minority statements filed by Senator Ashurst of Arizona and appended to the Committee report, the Committee either failed to act upon or rejected an amendment presented by him which would have added an express acreage limitation provision to S. 728.[16] No particular import can be ascribed to this incident related by Senator Ashurst. The record is devoid of any inference that a majority of the committee members, in failing to adopt the Ashurst amendment, favored an acreage limitation exemption for private lands. Even if Senator Ashurst's comments

13. Section 5(b) of S. 1274, 70th Cong., 1st Sess. (1928).

14. *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928).

15. S. Rep. No. 592, 70th Cong., 1st Sess. (1928).

16. *Id.,* part 2, at 26.

could be interpreted as an expression of his view that without specific incorporation the excess land laws would not apply, the construction placed on a bill by an unsuccessful opponent is not a reliable indicator of its meaning: "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill." *Mastro Plastics Corp.* v. *N.L.R.B.* 350 U.S. 270, 288 (1956). See also *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

During the consideration of the fourth Swing-Johnson bill, Senators Ashurst and Hayden conducted a filibuster. Senator Hayden offered many amendments including one similar to the excess land proviso of H.R. 5773.[17] This amendment, like dozens of others presented and printed during the filibuster, never came to a vote. Discussion of hydroelectric power production at Boulder Dam and of the interstate apportionment of the waters of the Colorado River dominated the debates. The issue of acreage limitation was only one of many incidental points advanced by the opponents of S. 728. There is no indication that the failure of the Senate to act on the amendment evinced its rejection of the proposition that excess land provisions would be applicable to private lands in Imperial Valley.

The House passed H.R. 5773 on May 25, 1928.[18] On December 5, 1928, Senator Johnson made a motion to substitute H.R. 5773 for S. 728 in such a way as to retain the bill number and enacting clause of H.R. 5773, on the one hand, and the text of S. 728, on the other. Referring to the fact that the House and Senate versions of the bill contained "like purposes" and "like designs," Senator Johnson urged the consolidation in order to further "orderly legislative procedure." The motion carried.[19] The bill with amendments was passed on December 14, 1928.[20]

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17. 69 Cong. Rec. 7634-35 (1928).

18. 69 Cong. Rec. 9990 (1928).

19. 70 Cong. Rec. 67-68 (1928).

20. 70 Cong. Rec. 603 (1928).

The debates contain no evidence that any members of the Senate viewed what had occurred as exempting private lands from the excess land laws. Under certain circumstances the rejection of a provision on the floor of either house of Congress can be referred to as an indication of legislative intent. In the instant case, however, the Senate did not reject the House bill. It did not purport to pass upon it. In fact, it could be argued that since the principal proponent had represented that the two bills had the same purpose and design, they were substantially the same, i.e., land limitations were included in each — which indeed was the case.

No better guideline exists for approaching the legislative material related above than that provided by Justice Rutledge in the case of *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945):

> The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

The Boulder Canyon Project Act must be read *in pari materia* with the general body of reclamation law. The rules in such cases were stated by Mr. Justice Miller in *Wilmot* v. *Mudge,* 103 U.S. 217, 221 (1880), as follows:

> First, that effect shall be given to all the words of a statute, where this is possible without a conflict; and Second, that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.

Excess land policy was the cornerstone of the reclamation law when the All-American Canal Project was authorized in 1928. "Derangement of a system thus rooted in

tradition" is not to be inferred from enactments which do not purport to alter that system, "where inveterate usage forbids the implication." Mr. Justice Cardozo, in *General Motors Acceptance Corporation* v. *United States,* 286 U.S. 49, 61-62 (9th Cir. 1932).

So firmly established are the excess land provisions of the reclamation law that Congress suspends their operation only where extraordinary circumstances dictate.[21] Where Congress has seen fit to waive or modify the excess land laws in certain projects, it has always found it appropriate to enact positive legislation setting forth the exemption or other modification in unmistakable terms.[22] Where Congress deems a departure from its established policy to be in order it so provides by express terms, and not by implication.

The doctrine of *pari materia* acquires special force in this case by virtue of the fact that the excess land laws had been undergoing a thorough overhaul since the report of the "Fact Finders" in 1924[23] and culminating in section

21. *Ivanhoe, supra,* at 292.

22. See Columbia Basin Antispeculation Act of May 27, 1937, 50 Stat. 208; Act of June 16, 1938, 52 Stat. 764 (Colorado-Big Thompson project); Act of October 14, 1940, 54 Stat. 1119 (water conservation and utilization projects); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt projects); Act of March 10, 1943, 57 Stat. 14 (Columbia Basin project); Act of June 27, 1952, 66 Stat. 282 (San Luis Valley project, Colorado); Act of August 28, 1954, 68 Stat. 890 (Owl Creek Unit, Missouri River Basin project); Act of September 3, 1954, 68 Stat. 1190 Santa Maria project); Act of August 1, 1956, 70 Stat. 775 (Washoe project); Act of August 6, 1956, 70 Stat. 1044 (small reclamation projects); Act of July 24, 1957, 71 Stat. 309-310 (East Bench unit, Missouri River Basin project); Act of September 4, 1957, 71 Stat. 608 (Kendrick project); Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande rehabilitation project, Mercedes division); Act of August 28, 1958, 72 Stat. 963 (Seedskadee project); Act of September 22, 1959, 72 Stat. 641 (Lower Rio Grande rehabilitation project, La Feria division); Act of September 27, 1962, 76 Stat. 634 (Baker project); and Act of October 1, 1962, 76 Stat. 677 (Columbia Basin project).

23. *Federation Reclamation by Irrigation,* S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

46 of the 1926 Act. This activity is reflected in adoption as modified of many of the recommendations of the Fact Finders on excess lands, in an act authorizing an Indian project (Act of June 7, 1924, 43 Stat. 475), in appropriation acts (Act of December 5, 1924, 43 Stat. 672; Act of March 3, 1925, Stat. 1141; Act of May 10, 1926, 44 Stat. 453) and in the Omnibus Adjustment Act of 1926, *supra.* It is worthy of note that the Omnibus Adjustment Act was enacted in the Congress immediately preceding that which enacted the Boulder Canyon Project Act.

A holding that the landowners in Imperial Valley are exempt from acreage limitations must find support in clear language of the Project Act. Substantial rights were conferred by that act. A grant by the United States of rights, privileges or immunities is construed strictly against the grantee and what is not expressly granted is reserved. The Supreme Court has stated,

> The reason of [this] rule is obvious — parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms.

Dubuque and Pacific Railroad v. *Litchfield,* 64 U.S. 66, 88-89 (1859). See also *United States* v. *Grand River Dam Authority,* 363 U.S. 229 (1960), *Slidell* v. *Grandjean,* 111 U.S. 412 (1883), *The Delaware Railroad Tax (Minot* v. *The Philadelphia, W. & B. R.R.),* 85 U.S. (18 Wall.) 206 (1874).

In *Wisconsin Central Railroad Co.* v. *U.S.,* 164 U.S. 190 (1896) the Court dealt with a situation analogous to that presented here. By an 1864 Act a grant of land was made to the railroad company, "upon the same terms and conditions" as in an 1856 Act. The 1856 Act provided that the rates for transporting mail could be fixed by Congress.

The act of March 3, 1873, prescribed the rates for transporting mail and provided that land grant railroads whose grant was on condition that Congress could fix the rates would receive 80% of the regular rate.

The company received 80 percent and sued in the Court of Claims for the balance of the regular rate. The Court held that the words "upon the same terms and conditions" incorporated in the 1864 Act, the provisions of the 1856 Act. "* * * [T]he settled rule is that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee." *Ibid.* at 202.

Applying the same rationale to the application of the acreage limitations to lands in Imperial Valley, section 14 of the Project Act incorporated the reclamation law, and the land limitation provisions of section 46 of the 1926 Act are part of the reclamation law. Nothing in the Project Act exempts the lands in Imperial Valley from section 46. Therefore, the land limitations of section 46 are a part of the Project Act; and since "statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee," the excess land laws apply to the lands in Imperial Valley served by the federal project.

The Wilbur Letter and Prior Administrative Practice

The repayment contract of the Imperial Irrigation District with the United States was executed by Ray Lyman Wilbur, Secretary of the Interior, on December 1, 1932. Article 1 states the contract is made "pursuant to" the reclamation law and Article 30 states that "Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation and maintenance of the works to be constructed hereunder."

It has been the practice of the Bureau of Reclamation to include in irrigation district contracts detailed requirements for the implementation of land limitation provisions. Such detailed requirements vary from case to case, but are substantially similar to those described in *Ivanhoe, supra,* at 285-86. No such detailed requirements were included in the Imperial Irrigation District contract, and to date the District has not complied with the excess land laws. Excess land provisions have been applied to lands within the Coachella Valley County Water District which are also serviced by the All-American Canal under contracts executed pursuant to the Boulder Canyon Project Act. Detailed provisions were included in the supplemental Coachella contract of December 22, 1947, in conformity with a ruling from the then Solicitor of the Department, Mr. Fowler Harper.[24]

An anomalous situation now exists. The two districts, Imperial and Coachella, while serviced by the same federally constructed facility, are accorded different administrative treatment as to excess land. The reasons for the administrative treatment accorded Imperial were announced in a letter, dated February 24, 1933, from the Secretary of the Interior Ray Lyman Wilbur to the Imperial Irrigation District.[25] See Appendix E for text.

24. Solicitor's Opinion, M-33902 (May 31, 1945). See Appendix H.

25. The Wilbur letter was written within three months following execution of the contract. While not relevant to the conclusion reached in this opinion, the record is ambiguous as to whether the Department had actually determined the excess land laws not to be applicable to Imperial Irrigation District prior to the execution of the contract. There is no direct evidence of such a conclusion. To the contrary, the only record we have been able to find of consideration of the question prior to the execution of the contract indicates that the excess land limitations did apply. On November 4, 1930, Executive Assistant to the Secretary Northcutt Ely stated that the excess land laws would have to be enforced in Imperial Valley. (Response No. 3 by Northcutt Ely. See Appendix D.)

The Wilbur letter itself states that the question was raised "early in the negotiations" and adds that "upon careful consideration the view was reached that this limitation does not apply to land now cultivated and having a present water right." When this conclusion was reached, the Secretary did not say.

The genesis of the Wilbur letter is found in a letter of February 4, 1933 (Appendix B), from Mr. Coffey to Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation.

Mr. Coffey's letter takes no position but reports a conversation with Mr. Charles L. Childers, general counsel for Imperial.

Secretary Wilbur based his conclusion that the excess land laws do not apply to the private lands in the Imperial District on two contentions. The first was that no "sale" of a water right had occurred within the meaning of section 5 of the Reclamation Act of June 17, 1902,[26] because the private lands in the Imperial District had a vested water right which was recognized by the Congress in section 1 of the Project Act through the water-charge exemption.

26. 32 Stat. 389. "No right to the use of water for land in private ownership shall be sold for a tract exceeding 100 acres to any one landowner * * *."

Mr. Childers apparently told Mr. Coffey that Mr. Dent and Judge Finney, the Solicitor, had agreed during the contract negotiations that acreage limitations did not apply to Imperial. He requested a formal Solicitor's ruling to that effect but significantly, said Mr. Coffey, "He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies * * *."

Assuming the Childers' conversation was correctly reported by Mr. Coffey — we have nothing directly from Mr. Childers — two facts are evident: first, that Mr. Childers is not certain that the application of the excess land laws is precluded by failure to incorporate detailed provisions in the contract; and, second, that he is not sufficiently certain that a conclusion has been reached that the excess land laws do not apply to preclude the possibility that a formal opinion might declare that they do.

Mr. Coffey's letter was transmitted to Mr. Ely by a memorandum of February 7, 1933 (Appendix B), from Mr. Dent. While the Dent memorandum, like the Wilbur letter, states that the question of applicability of the 160-acre limitation was raised "early in the negotiations connected with the All-American Canal contract," Mr. Dent went on to say that "So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that those lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned."

It is to be noted that while Mr. Dent stated that the question had arisen "early in the negotiations," he did not state that it had been then resolved. His remarks which follow that statement are as susceptible to a present resolution of the matter as to a resolution in the course of the negotiations.

Secretary Wilbur's understanding of the word "sale" in section 5 of the 1902 Act has already been disposed of, and the fact, that Congress gave Imperial an exemption from charges "for water and the use, storage, or delivery of water" does not constitute the granting of a water right.

This point is not material to the question being considered in this memorandum since, as has been shown, the ownership of a water right does not preclude the application of the excess land laws. However, if it were material, it must be pointed out that the language of section 1 of

By memorandum of February 16, 1933, Mr. Ely advised Mr. Dent that he concurred in the Dent view and requested Mr. Dent to prepare what became the Wilbur letter (Appendix C).

The only other contemporary departmental record heightens the ambiguity as to when the conclusion announced in the Wilbur letter was actually reached. This is the March 1, 1933, letter from Mr. Dent to Mr. Coffey (Appendix F). In this letter Mr. Dent referred to the opinion that he had shared with Mr. Coffey early in the negotiations that some specific provision should be inserted regarding acreage limitation. He then stated that representatives of the District feared that a specific provision "would only be confusing and make ratification by the landowners more difficult." He went on to say that the ground relied on by the Wilbur letter, i.e., non-applicability of the acreage limitation to lands having a vested water right, "Is the ground upon which you and I with reluctance agreed to elimination of the specific provision regarding acreage limitation." It is not clear from this statement whether Mr. Dent reluctantly agreed with that ground prior to execution of the contract, or only reluctantly agreed to delete a reference to excess lands on that ground.

In any event, in the extensive department files covering the negotiation of the Imperial contract, save for Mr. Ely's memorandum of November 4, 1930, there has been found no contemporary record either of legal analysis or discussion of the excess land question. On the other hand, these files do reveal that counsel for the Imperial District was not satisfied that a decision had been reached in the Department prior to execution of the contract, and sought formal assurance on the question. The request for formal decision was rejected in favor of the informal Wilbur letter. Neither in that letter nor in the memoranda leading up to its preparation is the ambiguity of when the decision was first reached resolved.

the Project Act does not in terms create or recognize a water right, it merely exempts from a charge. And as already noted "the established rule of construction in such cases is, that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule." *The Delaware Railroad Tax (Minot* v. *The Philadelphia, W. & B. R.R.)*, 85 U.S. (18 Wall.) 206, 225 (1874).

For the same reason the requirement in section 6 for "satisfaction of present perfected rights" cannot be read as insulating the District lands from acreage limitation. It is not in plain terms an exemption from the limitations of reclamation law in connection with the obligation to repay the cost of Imperial Dam and the All-American Canal.

We turn now to Secretary Wilbur's second contention, namely, that the Department had interpreted section 5 of the 1902 Act to permit the recognition of a water right for more than 160 acres in single ownership by allowing the continued flow of water covered by the right through federal project facilities.

This had been the position of the Department in the special situation where existing physical facilities were being acquired by the Government for incorporation in a project. In such cases, lands to which the water right was appurtenant were considered to be outside the project.

The first authority cited by Secretary Wilbur, Opinion of Assistant Attorney General, 34 L.D. 351 (January 6, 1906), serves to illustrate the limited nature of this practice. There, an entire irrigation system already partially completed and in service, owned by a private land and irrigation company, was proposed to be acquired by the United States at a purchase price of $15,000. It was to be incorporated into a larger federal reclamation project (East Umatilla). The agreement contemplated that some 8,000 to 9,000 acres of project land owned by the company would be placed in trust for sale to individuals in units conforming to the acreage limitations prescribed in accordance with sections 4 and 5 of the 1902 Act.

The company's water rights, held or claimed, were to be included in the conveyance to the United States except for the reservation by the company of a water right sufficient to irrigate 300 acres of land it proposed to retain. It was explained by the Director of the Geological Survey (of which the Reclamation Service was then — 1905 — a part) that to purchase the water right for the 300 acres would require a larger expenditure then could be justified.[27] The government agreed to satisfy this right through project works. The company was not to pay any construction charges although it was to pay for operation and maintenance.

The Director pointed out that:

> The furnishing of this water supply as part consideration is therefore a condition favorable to the United States. Besides, it is the usual practice in cases where an existing irrigation system is purchased for enlargement, to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. This practice is founded on sound business principles for it is always cheaper to furnish the water when available than to buy the right to water which has already vested.
>
> * * * * * * *
>
> If for instance the government were merely to recognize a vested right for water for 300 acres, the company could utilize the right only by building a canal system paralleling the government system or else the government would be required to forego the advantage of using the company's works now constructed.

He viewed section 10 of the 1902 Act[28] as authorizing the arrangement.

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27. Memorandum from Director, Geological Survey, to Secretary of Interior, November 16, 1905. See Appendix A.

28. 32 Stat. 390, 43 U.S.C. sec. 373. The section authorizes the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" for the purpose of carrying the provisions of the Act into full force and effect.

Assistant Attorney General Campbell, to whom the matter was referred for consideration, thereupon issued the decision cited in the Wilbur letter. The Assistant Attorney General concluded that under the transaction, the 300 acres covered by the reserved right, "is not brought within the limits of [the] project," *Supra* at 354. He held that the agreement did not conflict with section 5.[29]

The cases of the Newlands (Truckee-Carson) and North Platte projects alluded to by Secretary Wilbur involved comparable purchases of existing private irrigation works.[30]

This practice referred to by Secretary Wilbur is not a precedent for the Imperial Valley situation. The United States acquired no preexisting facilities; the Imperial lands were not only a part of the project, they were the primary reason for the project; and finally, the lands in Imperial were not exempted from, but were expressly required to repay, construction charges for the All-American Canal, Imperial Dam, and appurtenant structures "in the manner provided by the reclamation law." Section 4(b) of the Project Act.

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29. While the Wilbur letter does not cite it, the 1906 ruling was followed on May 31, 1910, by a departmental regulation (38 L.D. 637, para. 45), which is currently found at 43 CFR 230.70:

    The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges.

    As is apparent from comparison of its text with a headnote to the 1906 decision, this regulation was evidently intended as no more than codification thereof.

30. See Department of the Interior *Second Annual Report of the Reclamation Service*, 1902-3, at 368-69 (1904), and *Fourth Annual Report of the Reclamation Service*, 1904-5, at 236 (1906).

    Anna M. Wright, 40 L.D. 116 (1911), also referred to in the Wilbur letter, merely cited the 1910 regulation. It has no relevance to the question here involved.

On the other hand, the practice of the Department in respect or the carriage of water through reclamation project facilities for the irrigation of desert land entries shows an intention to apply excess land limitations of reclamation law if project benefits are received. This situation is analogous to that presented by the privately owned lands in the Imperial Irrigation District.

To obtain a desert land entry, an entryman must demonstrate the fact and legal sufficiency of his water right. If the claim is one of an appropriative right, he must show that he has taken all necessary steps to perfect that right as one of the requirements of making final proof. *Instruction,* November 16, 1906, 35 L.D. 305, 43 CFR 2226.1-5(h).

By section 5 of the Act of June 27, 1906 (34 Stat. 520, 43 U.S.C. sec. 448) a desert land entryman is permitted under certain circumstances to bring his entry under a reclamation project and obtain a water supply through the project if he complies with reclamation law and relinquishes that part of his entry in excess of 160 acres. The Department's regulation under this act states, however, that —

> Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.[31]

In short, the desert land entryman, who for this purpose is treated like the owner of patented lands, has a choice. He can rely on his own efforts to convey his water to his entry without assistance from the government project, thereby avoiding the requirements of the reclamation law, or he can participate. In the latter case he must observe the law's requirements including land limitation.

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31. *Regulations,* May 31, 1910, 38 L.D. 646, para. 78; currently, 43 CFR 230.110.

It is evident that neither the existence nor nonexistence of a vested water right is itself determinative of whether the excess land laws are applicable in any given case. Where, as here, the claimants of existing water rights have sought and obtained the construction of a federal reclamation project to eliminate the hazards of drought, flood and silt and to obtain a canal entirely within the United States, they must accept the conditions imposed by federal law.

Administrative Practice
Subsequent to the Wilbur Letter

As soon as the Wilbur letter was issued representatives of the District expressed concern that reliance had been placed exclusively on section 5 of the 1902 Act whereas the principal problem was the effect of section 46 of the 1926 Act. Assistant Commissioner and Chief Counsel Dent replied[32] to this suggestion by stating that section 46 was only an incorporation of section 5 of the 1902 Act as construed by the Wilbur letter. Dent conceived, albeit "with reluctance," that section 5 precluded application of the excess land laws to lands having a vested water right. We have already disposed of this argument and have analyzed section 5 of the 1902 Act and the Acts supplementary thereto, including section 46 of the 1926 Act.

Mr. Dent also argued that the Boulder Canyon Project Act was complete in itself and did not incorporate reclamation law. This argument completely ignores the import of sections 1, 4(b), and 14 of the Project Act.

In 1944, William E. Warne, Assistant Commissioner of Reclamation, testifying before a Senate subcommittee, stated that acreage limitation provisions relative to private lands were not carried into effect by the Boulder Canyon Project Act and had not been applied to Imperial Valley.[33] The following day, the Assistant Commissioner

32. Letter from Porter W. Dent to Richard J. Coffey, March 1, 1933. See Appendix F.

33. *Hearing on H.R. 3961 before the Subcommittee of the Senate Committee on Commerce,* 78th Cong., 2d Sess., pt. 5, at 599 (1944). See Appendix G.

qualified this testimony by linking the exemption not to the law but directly to the Wilbur letter,[34] thereby revealing that his statements were not based on new and independent legal research.

Doubts as to the legal validity of the Wilbur opinion were expressed in December of 1944 in connection with negotiations for a supplemental contract between the United States and the Coachella Valley County Water District. Commissioner of Reclamation Bashore advised the Secretary on December 15, 1944, that —

> Probably because of an informal decision of the then Secretary of the Interior, Ray Lyman Wilbur * * * *, the Coachella contract of October 15, 1934, contained no provision for enforcement of the excess-land provisions * * *. The correctness of the 1934 contract's disregard of the excess-land laws is doubtful, in the opinion of the Chief Counsel of the Bureau; and he is of the opinion that the proposed contract is subject to the excess-land laws * * *. Because the applicability of a Departmental ruling is involved, and perhaps the soundness of that ruling, I recommend that this matter be referred to the Solicitor for an opinion on the applicability of the excess-land laws to the proposed contract.[35]

The matter was referred to Solicitor Fowler Harper, who rendered a formal opinion holding that the Wilbur letter was not intended to apply to Coachella lands.[36] But this limited finding did not prevent the Solicitor from raising serious doubts as to the validity of the Wilbur opinion. In contrast to the Wilbur letter, Fowler Harper's opinion construed the Project Act as incorporating the excess land provisions of the reclamation law.

The apparent inconsistency in administrative treatment on excess lands accorded the Imperial and Coachella districts gave rise to an inquiry from the Veterans of Foreign

34. *Id.* at 764.

35. Memorandum from Commissioner Bashore to Secretary Ickes, December 15, 1944.

36. Solicitor's Opinion, M-33902 (May 31, 1945). See Appendix II.

Wars to the Secretary in March of 1948. In reply, then Secretary Julius A. Krug confirmed the fact that different administrative practices were followed with regard to the two districts:

> Concerning * * * the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.
>
> To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the *Coachella* case would otherwise be applicable in the *Imperial* case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.[37]

It is pertinent to observe that Secretary Krug does not purport to give a legal interpretation of the Imperial question in the above entry. Solely in deference to considerations of economic reliance, the Secretary elected to continue the practice of exempting the Imperial lands from acreage limitations.

In 1958 the question of acreage limitation in Imperial Valley was raised outside the Department of Interior in proceedings held before the Hon. Samuel H. Rifkind,

37. Letter from Secretary Krug to H. C. Herman, April 27, 1948. See Appendix I.

Special Master of the Supreme Court, in the case of *Arizona* v. *California*. In its oral argument the State of Arizona sought certain admissions relative to Imperial Irrigation District's noncompliance with the excess land provisions of the reclamation law.[38] The Special Master asked that memoranda be submitted on the question of whether a motion for admission ought to be granted. Pursuant to this request the Solicitor General of the United States, Hon. J. Lee Rankin, sought the views of the Solicitor of the Department of Interior, Elmer F. Bennett.[39] Solicitor Bennett, while doubting that acreage limitation had any relevance to the major issue of water entitlement, voiced the following concerns which were reminiscent of those expressed a decade earlier by Secretary Krug:

> * * * I have not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so. * * *
>
> The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.[40]

38. Record, vol. 94, pp. 15, 550-15, 601, *Arizona* v. *California*, 373 U.S. 546 (1963).

39. Letter from the Hon. J. Lee Rankin to Elmer F. Bennett, January 24, 1958.

40. Letter from Elmer F. Bennett to the Hon. J. Lee Rankin, February 5, 1958. See Appendix J.

It is important to note that no pretense was made at offering a legal opinion on the Imperial question.

The memorandum filed in behalf of the United States took the position that the issue of noncompliance had no relevancy to the *Arizona* v. *California* dispute at bar.[41] The Solicitor General did not refrain, however, from expressing his opinion on the merits of the issue posed by the State of Arizona:

> Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion, as well as others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley just as are the similar limitations relating to public lands opened for entry within the district.[42]

Finally, there is the 1961 inquiry of the then Chairman of the Senate Committee on Interior and Insular Affairs and the inquiry of Senator Kuchel in April of 1964 during the hearing on S. 1658 which were adverted to at the outset of this opinion.

Effect of Administrative Practice

The facts in this case apparently suggested to Secretary Krug and Solicitor Bennett that the Wilbur letter, the long practice of non-enforcement and the reliance which may have been placed on these circumstances by private parties, precluded a re-examination of the legal basis for the exemption of lands in Imperial Valley from acreage limitations. Other circumstances have compelled us to make that examination, and we have found Secretary Wilbur's ruling to be without legal foundation. The question now is whether the Wilbur ruling, the long practice

41. Memorandum in Behalf of the United States with Respect to Relevance of Noncompliance with Acreage Limitations of Reclamation Law, February 28, 1958, *Arizona* v. *California,* 373 U.S. 546 (1963).

42. *Id.* at 3, fn. 5. See Appendix K.

of non-enforcement and the assumed reliance can have the effect of validating the exemption which was initially without legal justification. The answer is, of course, that they cannot.

It is well settled that administrative practice cannot " * * * thwart the plain purpose of a valid law." *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32 (1940). Even if it might be said that Secretary Wilbur's interpretation of section 5 of the 1902 Act was plausible, the law in 1933, when he wrote, included the 1912 Act, the 1914 Act and the 1926 Act, which clearly forbade the conclusion he reached and which he completely ignored. As Judge Story said, "One cannot wink so hard as not to see...." *The Henry Ewbank,* 1 Summ. 400, 11 Fed. Cas. 1166, 1168, Fed. Cas. No. 6,376 (1833).

Long practice, especially long practice of neglect, cannot make legal that which was initially illegal. The Supreme Court in *Baltimore and Ohio Railway Co.* v. *Jackson,* 353 U.S. 325 (1957) and *United States* v. *DuPont & Co.,* 353 U.S. 586 (1957), cases involving administrative positions of more than 60 and 40 years' standing, respectively, upset them to require compliance with the plain language of the law.

Finally, the fact that private parties may have relied upon the Wilbur ruling would not alter our conclusion. "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917). The Government holds its interests in trust for all the people and its agents cannot estop the United States by neglect or acquiescence. *United States* v. *California,* 332 U.S. 19, 40 (1947).

State Court Proceedings

The only issue remaining is whether the state court confirmation proceedings or the decision in the *Malan* case preclude present inquiry into the validity of the administrative acreage limitation exemption. It is clear that they do not.

The confirmation action (*Hewes* v. *All Persons,* No. 15460, Superior Court of Imperial County, California) was filed in 1933 pursuant to Article 31 of the Imperial Contract and in accordance with section 46 of the 1926 Act.

In a finding of fact the court concluded that the contract would not impose excess land limitation[43] and it entered a decision holding the excess land laws inapplicable.[44]

It suffices to say that the United States, not having intervened as a party and, since it is not suable without its consent, not having been reached by the "in rem" nature of the action, is not bound by either the finding, the decision, or indeed by the judgment finally entered.

The Malan case *(Malan* v. *Imperial Irrigation District)* proceeded in the same court and concurrently with the confirmation action. Malan, an excess landowner, asserted the repayment contract to be invalid under California law because it subjected the district to the excess land laws. It was the *Malan* case that gave rise to the request for a ruling which resulted in the Wilbur letter. Malan's case was dismissed in the same unreported decision that confirmed the contract, the court holding that the contract did not impose acreage limitations.

Again, the United States not having been a party, it is not bound by this decision. Contrary to Malan's contention it should be noted that California law does not preclude an irrigation district from contracting to observe the federal excess land laws. *Ivanhoe Irrigation District* v. *All Persons,* 2 Cal. Reptr. 317, 350 Pac. 2d. 69 (1960).

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43. Finding of Fact No. 35, July 1, 1933.

44. Superior Court, Imperial County, unreported.

Conclusion

The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been expressed by Congress as its plain intent.

The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress. The fact that the Department has failed for over 30 years to enforce the excess land laws acreage limitations in Imperial Valley cannot legitimize a violation of public policy contrary to the spirit and the letter of the law.

I have concluded, after a consideration of all issues, that the question stated on page 3 of this memorandum must be answered in the affirmative: Privately owned lands in Imperial Irrigation District, even those assumed to have vested Colorado River water rights, are subject to the excess land laws.

FRANK J. BARRY,
Solicitor.

APPENDIX

This Appendix is voluminous because many of the records which are pertinent to this opinion are not published elsewhere.

Items:

A Memorandum from the Director of Geological Survey to the Secretary of Interior, November 16, 1905.

B Memorandum from Porter W. Dent to Northcutt Ely, February 7, 1933.

C Memorandum from Northcutt Ely to Porter W. Dent, February 16, 1933.

D Item No. 8 posed by Richard J. Coffey and response No. 8 by Northcutt Ely, November 4, 1930.

E Letter from Secretary Wilbur to Imperial Irrigation District, February 24, 1933.

F Letter from Porter W. Dent to Richard J. Coffey, March 1, 1933.

G Testimony of William E. Warne, Assistant Commissioner of Reclamation, during Hearing on H.R. 3961 before a subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. 599, 764 (1944).

H Solicitor Harper's Opinion, M-33902 (May 31, 1945).

I Letter from Secretary Krug to H. C. Hermann, April 27, 1948.

J Letter from Solicitor Bennett to Solicitor General Rankin, February 5, 1958.

K Footnote 5 of the Memorandum in Behalf of the United States with Respect to Relevance of Non-Compliance with Acreage Limitations of Reclamation Law, filed in the case of *Arizona* v. *California*, No. 10 Original, October Term 1957, Before the Honorable Simon H. Rifkind, Special Master.

L Letter from Senator Clinton P. Anderson to Secretary Udall, August 7, 1961.

M Letter from Secretary Udall to Senator Clinton P. Anderson, May 15, 1962.

APPENDIX A

November 16, 1905.

The Honorable the Secretary of the Interior,
Dear Mr. Secretary:

By reference from the Department under date of November 11, I am in receipt of my letter of the 8th instant recommending that $1,000,000 be set aside for the Umatilla Project in Oregon.

Said letter was returned with the following indorsement:

> Respectfully returned to the Director of the Geological Survey for report on the following propositions:
>
> 1. Do not the provisions of paragraph 2 of the enclosed agreement conflict with the provisions of paragraph 5 of the Reclamation Act prohibiting the right to the use of water on land in private ownership in excess of 160 acres.
>
> 2. Are not the provisions of paragraph 11 likewise in conflict with the provisions of said paragraph 5 of the Reclamation Act.
>
> 3. What authority has the Secretary of the Interior, under existing law, to approve the provisions of paragraph 13 of said agreement which contemplates the extension of time for compliance with the provisions of the Desert Land Act.
>
> Return all enclosed papers with your reply.

The first proposition calls attention to the provisions of paragraph 2 and asks whether or not they conflict with the provisions of section 5 of the Reclamation Act, "prohibiting the right to the use of water on land in private ownership in excess of 160 acres."

In paragraph 2 of the contract it is provided that the United States shall recognize a vested right in the said company for 300 acres to be hereafter selected by it. These lands are now owned by the company and it has, as stated in my letter of transmittal, partially completed the construc-

tion of a canal system to irrigate them. The company had already furnished water to certain of its lands and proposed to continue the construction until the canal would be completed to cover the entire area owned by it, which would give them a vested right for water for nearly 9,000 acres. The claim to water for the greater part or the whole of this area would then be established, for the company has been diligently prosecuting its work.

There has already been established in the company a vested right to the use of part of these waters and the company would either require the recognition of this right or else payment at the rate of $50 an acre therefor. This would be a much larger amount than is involved in furnishing the water supply in question for 300 acres, for the reason that the right of the company to a certain amount of the waters of Umatilla River can be utilized in the project without additional expense.

As the entire project is intended to irrigate about 20,000 acres, the amount of water required to irrigate 300 acres would be one-sixty-sixth of the entire amount of water carried in the system, and as the main feed canal for the reservoir is to carry flood water and must be of sufficient size to carry a large volume in a short time, the storage of the added quantity required for 300 acres would involve no additional expense. Furthermore, the lateral system of the project must cover the entire area irrigated and would necessarily be built of the same extent whether or not these 300 acres were to be irrigated.

The furnishing of this water supply as part consideration is therefore a condition favorable to the United States. Besides it is the usual practice in cases where an existing irrigation system is purchased for enlargement to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. This practice is founded on sound business principles for it is always cheaper to furnish the water when available than to buy the right to water which has already vested.

The water right for at least 300 acres has now vested in the company and it is such a right as would be subject to the provisions of section 8 of the Reclamation Act, that nothing therein "shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation or *any vested right acquired thereunder.*"

If for instance the government were merely to recognize a vested right for water for 300 acres, the company could utilize the right only by building a canal system paralleling the government system or else the government would be required to forego the advantage of using the company's works now constructed.

In the former case the government would be required to pay the company the additional cost to them of new construction without deriving any benefit from such expenditure, for the government system as proposed would carry the required water supply without extra cost for construction. The necessary crossing and recrossing of a parallel system would also add to the cost of the government system.

In the latter case the government would be required to spend a greater sum in the construction of its system because it would not have the use of the excavation and other work already performed by the company. There would be further expense for right-of-way as most of the odd sections crossed are railroad lands now in the hands of other parties.

Congress could not have had in mind that the vested rights should be recognized and at the same time deprive the parties of the existing means of conveying the water, for such has not been the practice, as must have been well-known to all the members of Congress from the Reclamation States. In fact the laws of most western States provide for the enlargement of ditches and occupation in common by the parties, and the courts of all the States of the West have repeatedly recognized this right, which is just as essential in irrigation matters as the common right of

occupancy of canyons, passes and defiles by railroad companies, recognized by section 2 of the Act of Congress of March 3, 1875 (18 Stat. 482).

It is understood by this office that section 8 of the Reclamation Act authorizes and requires the Secretary of the Interior to recognize such vested rights and it has heretofore been the policy of the engineers of the Reclamation Service in negotiating contracts of this kind to provide for the recognition of such rights and the furnishing of the water whenever this plan would be cheaper than to pay for the water rights involved.

It is believed that the prohibition of section 5 of the Reclamation Act that, "no right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one landowner," does not apply to such cases as this, because the water right is not sold, belonging as it does to the company, and such ownership being recognized by the contract.

This water right having vested in the company and not being subject to sale by the Secretary of the Interior, the carriage of the water does not seem to be prohibited by the Reclamation Act.

I find nothing in the Reclamation Act which prohibits such treatment of vested rights to the use of water, and the general authority given to the Secretary of the Interior by section 10 of the act, "to perform any and all sets and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect" was evidently intended to cover the many details of administration of this kind arising in connection with such a complex business system as a large irrigation enterprise, and which could not be specifically provided for in a general act.

This question was considered by the Department in passing upon the purchase of the system of the Klamath Falls Irrigating Company (Ankeny Canal), October 9, 1905 (Assistant Attorney General's opinion of October 3) and doubt was expressed upon these points.

The negotiations with the Maxwell Land and Irrigation Company had been concluded and the form of contract agreed upon, before this opinion was known to the engineers engaged upon this matter.

The present contract was submitted to the Department for consideration in connection with a discussion which was in course of preparation for presentation to the Department in order that these questions might be again considered along lines similar to the present discussion. The letter concerning the Klamath Falls Irrigating Company's case will be forwarded in a few days.

The second proposition of the endorsement refers to paragraph 11 of the contract with the company. The intent of the paragraph is to permit the company to operate its present water system and to supply to certain parties, with whom they have contracts, water sufficient to complete their cultivation under the Desert Land Act, until such time as the government project shall be completed and in operation. The government undertakes no responsibility for furnishing water to the lands specified under this paragraph in schedule A. The company is to continue the operation of its system for this purpose until the government system has been completed, in which case the parties in question will either make application under the Reclamation Act or receive no further water supply. It was stated to the engineers negotiating this agreement that these parties proposed to make final proof next year.

It was supposed that the provisions of paragraph 11 would be acceptable as they cannot be understood as placing any obligation upon the government to furnish water to the lands listed in schedule A.

The third proposition of the indorsement of the Secretary relates to paragraph 13 of the contract with the company, in which it is agreed, (1) that the desert land entrymen listed in schedule B may complete the acquisition of their lands by obtaining water under the Reclamation Act; (2) that they shall have such extension of time in which to conform to the requirements of the desert land act as may become necessary on account of their obtaining water for

such lands from the reclamation project; and (3) that water shall not be furnished for more than 160 acres to each of such claimants.

The first and third of these provisions conform to the decision of the Secretary of the Interior of July 14, 1905 (Department letter No. 230-1903), holding that desert land entrymen could be recognized as proprietors of the land entered, within the spirit and purpose of the Reclamation Act, and that if the entry involves more than 160 acres of irrigable land the entryman must relinquish the excess.

The second provision of paragraph 11 of the contract involves the question of extension of time. In the Departmental letter referred to it was stated that it is not advisable to anticipate that question.

As the matter of extending the time for these desert land entries was of great importance, it was deemed advisable that the matter should be made part of the contract and in that manner be brought to the attention of the Department for consideration and decision.

The company, as stated in paragraph 12 of the contract, is under obligations to furnish water to these entrymen in order that they shall be able to comply with the Desert Land law, the entries having been made in view of the proposed construction of the company's canal system which would probably have been completed next spring if the government project had not intervened.

These entrymen would be left in a very uncertain position as to the validity of their entries if they should bring themselves within the provisions of the Reclamation Act in pursuance of the provisions of Departmental letter of July 14, 1905, and at the same time find themselves unable to make proof under the Desert Land Act. It would therefore be unlikely that any of them would bring their lands within the project until it should be determined that they would be permitted to make final proof when the Government had furnished water from the project, even though at a later period than was contemplated by their entries.

The entrymen could not be expected to release the Maxwell Land & Irrigation Company from its obligation to furnish the water unless they were assured that they could make proof by means of the water supply furnished under the Reclamation Act.

If they were compelled to rely upon the smaller system of the company which would be built if the Reclamation project were not, the lands might be irrigated sufficiently to comply with the Desert Land Act but they would not be nearly so productive as if irrigated under the reclamation project. It is therefore not only an advantage to the project if these entrymen can be brought within the provisions of the Reclamation Act, but also of general benefit to the Government and all public interests, as providing for a more efficient and productive use of the land in question.

The authority of the Secretary of the Interior to allow final proof to be made at such time as would be possible under the Reclamation project seems to be deducible from several Departmental decisions, as for instance the case of *Thompson* v. *Bartholet,* 18 L.D. 96 (1894).

The rule of the board of equitable adjudication therein quoted specifies certain causes of failure on the part of the entryman which can be considered in connection with the matter of confirming the entry, among them, "obstacles which he could not control."

The conditions existing in these cases would come within this description as the withdrawal of this company and its decision not to complete its system would clearly be an obstacle which he could not control.

Under the decision in *Thompson* v. *Bartholet, supra,* a continuance of the effort on the part of the entryman to comply with the law in good faith would authorize the acceptance of his proof after the expiration of the statutory period and bar the attachment of an adverse claim.

Under the terms of Departmental letter of July 14, 1905, referred to, the question of extending the time was left unsettled and it was therefore assumed that an investi-

gation of the matter along the lines herein indicated might result in a decision that such action could be authorized, and it was supposed that upon consideration of the contract in question the Department would decide whether such action could be taken.

The papers transmitted are herewith returned as directed.

Very respectfully,

THOMAS WALCOTT,
Director.

APPENDIX B

February 7, 1933

Memorandum for Mr. Ely

Attached letter of February 4 from District Counsel Coffey is self-explanatory.

This letter refers to the suit now pending in the Superior Court of Imperial County, California entitled *Charles Malan* v. *Imperial Irrigation District et al.* Among other things the complaint in this case contain the following allegation:

> And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land.

The foregoing is an incorrect statement of the reclamation law in this respect. Presumably the pleader intends to refer to section 5 of the Reclamation Act of June 17, 1902, which reads in part as follows:

> No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any

> one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

It will be noted that the reclamation law instead of providing, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area, provides that no water shall be *sold* for a tract in excess of 160 acres in single ownership.

The All-American Canal contract with the Imperial District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

> * * * *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation of water for potable purposes in the Imperial or Coachella Valleys * * *.

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested water right when the provision was inserted that no charge shall be made for the storage, use or delivery of water to be furnished these areas.

In connection with the activities of the Bureau it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (*Opinion of Assistant Attorney General,* 34 L.D. 351 (1906); *Anna M. Wright,* 40 L.D. 116 (1911)). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

It is my view that the limitation quoted from section 5 of the Reclamation Act does not apply to those areas now cultivated and having a vested right to the use of water.

The provision quoted from section 5 relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Project Act and act of June 27, 1906, 34 Stat. 519).

This matter is submitted for your consideration and such action as may be considered advisable. If the Department is in agreement with the foregoing I believe a letter to the district or a formal decision to that effect would be helpful.

PORTER W. DENT,
Assistant Commissioner.

608 Grant Building,
Los Angeles, California,
February 4, 1933.

Mr. P. W. Dent
Assistant Commissioner
Bureau of Reclamation
Washington, D.C.

Dear Mr. Dent:

Mr. Childers, attorney for Imperial Irrigation District, advises me that he is very much worried over that particular part of the complaint in the Malan suit, copy of which you have in the files at Washington, which claims that the All-American Canal contract is illegal because of the feature of the general reclamation laws which restricts the use of water to one hundred sixty acres. He advises me, also, that at one time he discussed the matter with Judge Finney, and with you, and that you were both of the opinion that the 160-acre restriction on the use of water, found in the reclamation laws, didn't apply to the All-American Canal contract.

Childers is very anxious to get a ruling on the point from the Solicitor, prior to the hearing of the confirmation proceedings and the Malan suit, both of which are to be called up for hearing on March 6, next; provided, that such ruling would be that the 160-acre limitation did not apply. He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned.

I wonder if it wouldn't be a good plan for you to discuss the matter with Judge Finney and see what may be done in this regard.

As you have noted from a clipping which I sent in the other day, Directors DuBois and Blair were defeated at the general district election held February 1. They were strong supporters of Mark Rose, but the campaign issue which seemed to have ousted them was that they were not doing their best to bring about construction of the All-American Canal. The press states that a campaign is now under way to recall Directors Aten and Adams, on the claim that they too are hindering consummation of the All-American Canal deal.

Sincerely yours,

RICHARD J. COFFEY,
District Counsel.

APPENDIX C

February 16, 1933

Memorandum for Mr. Dent

I agree with the views expressed in your memorandum of February 7 regarding the case of *Charles Malan* v. *Imperial Irrigation District et al.* Will you be good enough to have a letter from the Secretary to the Board prepared along those lines?

NORTHCUTT ELY.

APPENDIX D

Item No. 8 posed by Richard J. Coffey for consideration in connection with the Imperial All-American Canal contract (no date):

8. Reclamation laws restrict individual holdings to 160 acres. How does this affect the District.

Response No. 8 by Northcutt Ely to Item No. 8, November 4, 1930:

8. The Reclamation Law's limitation of 160 acres to a particular owner presents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area. I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutary effect on suspected speculative activities in that locality.

APPENDIX E

February 24, 1933

Imperial Irrigation District,
El Centro, California

Gentlemen:

Information at hand indicates that in connection with the contract with your district signed by me on behalf of the United States under date of December 1, 1932, some question has been raised concerning the maximum area of land in single ownership that may be irrigated from the proposed All-American Canal. My attention has been specifically called to the suit now pending in the Superior Court of Imperial County, California entitled *Charles Malan* v. *Imperial Irrigation District et al.* Among other things the complaint in this case contains the following allegation:

> And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any landowner owning more than 160 acres of land.

The foregoing is an inaccurate statement of the reclamation law in this respect. Presumably this allegation is intended to refer to section 5 of the Reclamation Act of June 17, 1902, which reads in part as follows:

> No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. (Italics supplied).

It will be noted that while the reclamation law provides that no water shall be *sold* for a tract of land in excess

of 160 acres in single ownership, it does not provide, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area.

The All-American Canal contract with the Imperial Irrigation District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

> * * * *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys.

Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the Reclamation Act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered

by the right through the works constructed by the Government. (*Opinion of Assistant Attorney General,* 34 L.D. 351 (1906); *Anna M. Wright,* 40 L.D. 116 (1911).) On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

The provision quoted from section 5 of the Reclamation Act relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Act and act of June 27, 1906, 34 Stat. 519.)

The foregoing has been long settled by decisions of the Department and by the practice in carrying such decisions into effect.

Sincerely yours,

RAY LYMAN WILBUR,
Secretary.

APPENDIX F

March 1, 1933

Richard J. Coffey, Esquire
608 Grant Building
Los Angeles, Cal.

Dear Mr. Coffey:

In your telegram of February 28 from Phoenix relating to the All-American Canal contract you requested that Mr. Childers be furnished with a certified copy of the Department's ruling on the 160-acre limitation. When your telegram was sent you no doubt assumed that this ruling would take the form of a formal decision. This, however, is not the case. It was decided that the matter should be passed upon in a letter addressed by the Secretary to the Imperial Irrigation District. This letter was dated February 24 and I understand the original has been forwarded by Messrs. Du Bois and Dowd to Mr. Childers. If the letter is to be used in the case under the well-known rule a certified copy could not be used until satisfactory explanation is made of failure to produce the original. A certified copy, therefore, presumably, would serve no useful purpose and accordingly is not being furnished.

Messrs. Du Bois and Dowd were in the office this morning and exhibited a telegram received by them from Mr. Childers, who in his telegram indicated that the situation is not fully met in that the discussion relates to the 160-acre limitation in the Reclamation Act, whereas they are apprehensive concerning the act of May 25, 1926, presumably section 46. You will recall that this is a matter which was very extensively discussed. You and I were of the opinion that some specific provision should be inserted regarding this acreage limitation and the original draft of contract so provided. However, representatives of the district entertained the fear that should a specific provision be inserted in the contract it would only be confusing and make the ratification by the landowners more difficult. In my view the same principle discussed in the Secretary's letter of February 24, based upon section 5

of the Reclamation Act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect.

The Secretary's letter was directed to the specific allegations in the complaint, which, so far as could be ascertained, had no direct reference to the act of May 25, 1926. I assume, however, that regardless of the allegations in the complaint, Mr. Childers is apprehensive that argument may be submitted based upon the 1926 act. If this is done it seems to me the defense would necessarily be based upon the propositions, first, that the All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and that this stands upon a basis quite different from the ordinary conception of a project. The second proposition is that the acreage limitation in the reclamation law (including section 46 of the act of May 25, 1926) does not apply to the lands having a vested right. This is the ground upon which you and I with reluctance agreed to elimination of the specific provision regarding acreage limitation.

Section 14 of the Boulder Canyon Project Act provides that it shall be deemed a supplement to the reclamation law, which shall govern the construction, operation and maintenance of the works authorized except as otherwise provided in that act. The specific provisions of the Boulder Canyon Project Act are therefore controlling. Section 4(b) of this act provides that contracts for repayment of costs shall be made before any money is appropriated or construction started. Section 46 of the act of May 25, 1926, contains an entirely different provision in this respect. This section does not require a contract in advance of appropriation of money or construction but does require a contract of the character described before water is delivered. Section 46 is of general application and of course contemplates a case where a project is being constructed from which a new and complete water right will be sold and where a distribution system is constructed and water deliveries made through it. The special conditions in the Imperial and Coachella Valleys were known to Congress, and I believe some consideration was given

to incorporating a special provision regarding the acreage limitation, though my memory in this respect is not entirely clear. Mr. Childers probably may recall what was contemplated and the reasons for no specific provision being inserted in this respect.

I hope the outcome of litigation will be satisfactory.

Sincerely Yours,

PORTER W. DENT.

APPENDIX G

Testimony of William E. Warne, Assistant Commissioner of Reclamation, during Hearing on H. R. 3961 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess. 599, 764 (1944):

Representative Elliott. Why was the limitation lifted in the southern part of California down in the Imperial Valley? Why was that 160-acre limitation lifted? That applied there, just the same as it did elsewhere.

Mr. Warne. No, there was never a 160-acre limitation applied to the Imperial Valley.

Representative Elliott. There weren't any uniform water districts until that was developed, were there?

Mr. Warne. The irrigation district has been in existence much longer than the Boulder Canyon project dam.

Representative Elliott. But I say, was it not a matter of fact that they would not sign that water district until that limitation was taken off?

Mr. Warne. The limitation was never applied under the law to the Imperial Valley, except as a matter of new lands —

* * *

Mr. Warne. Yesterday, I indicated the development of the lands of the Imperial irrigation district [sic] from the Reclamation Act. There is, however, a letter from Ray Lyman Wilbur, Secretary of the Interior, dated February 24, 1933, addressed to the Imperial Irrigation District, El Centro, California, which I would like to submit for the record on that matter.

APPENDIX H

APPLICABILITY OF THE EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAW TO THE BOULDER CANYON PROJECT ACT

FEDERAL RECLAMATION LAW — BOULDER CANYON PROJECT ACT — APPLICABILITY OF THE EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAW TO COACHELLA VALLEY COUNTY WATER DISTRICT LANDS.

Section 14 of the Boulder Canyon Project Act (45 Stat 1065; 43 U.S.C. sec. 617m) declares that statute to be a supplement to the Federal reclamation law and thereby carries into operation as to lands irrigated under authority of the former act the excess land provisions contained in the latter legislation.

The Coachella Valley County Water District lands are subject to the excess-land provisions of the Federal reclamation law.

M-33902

May 31, 1945

The Honorable the Secretary of the Interior.

My dear Mr. Secretary:

Reference is made to Commissioner Bashore's memorandum to you, dated December 15, 1944, in which he recommends that my opinion be obtained on the question of the general applicability of the excess land provisions of the Federal reclamation law to the Coachella Valley County Water District lands in California.

This question arises in connection with a proposed contract between the United States and the Coachella Valley County Water District to provide for the construction of a new distribution system to furnish irrigation water, and to cover repayment of the increased costs of the All-American Canal, and appurtenances. Previously,

the construction of the All-American Canal, for the purpose, *inter alia,* of supplying irrigable water to the Coachella Valley, was undertaken pursuant to a contract entered between the United States and the Coachella Valley County Water District on October 15, 1934, contract symbol Ilr-781. This contract was made pursuant to the act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory and supplementary thereto, commonly known and referred to as the Federal reclamation law, and particularly pursuant to the act of December 21, 1928 (45 Stat. 1057, 43 U.S.C. sec. 617), designated as the Boulder Canyon Project Act. The question whether the general excess land provisions which are part of the Federal reclamation law, apply to the Coachella Valley Water District lands, depends on the construction and the interpretation of these statutes.

It is my opinion that the excess land provisions of the Federal reclamation law apply to the Coachella Valley County Water District lands and, accordingly, these provisions should be incorporated in the contracts presently under consideration.

The Federal reclamation law is contained in the Reclamation Act of June 17, 1902 (32 Stat. 388), which, together with acts amendatory and supplementary thereto, forms a complete legislative pattern in the field. The Supreme Court describes this type of legislation succinctly in *United States* v. *Barnes,* 222 U.S. 513, 520 (1912):[1]

> Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an

1. This case held that certain procedures set out in section 3177 of the Revised Statutes, providing for the enforcement of the internal revenue laws, applied to the collection or enforcement of the specific tax imposed on oleomargarine by the act of August 2, 1886, c. 840, 24 Stat. 209.

> implication that *the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.* * * * (Italics supplied.)

Congress has followed precisely this type of legislative policy in enacting the Federal reclamation law.

The excess land provisions of general applicability in this law are the following:

The Reclamation Act of June 17, 1902 (32 Stat. 388, 389, 43 U.S.C. sec. 431);

Section 46 of the Omnibus Adjustment Act of May 25, 1926 (44 Stat. 636, 649, 43 U.S.C. sec. 423(e));

The Warren Act of February 21, 1911 (36 Stat. 925, 926, 43 U.S.C. secs. 523, 524);

The act of August 9, 1912 (37 Stat. 265, 266, 43 U.S.C. secs. 543, 544;

The Reclamation Extension Act of August 13, 1914 (38 Stat. 686, 689, 43 U.S.C. sec. 418).

Since, in the opinion of the Bureau of Reclamation, "the excess land provisions of section 46 of the Omnibus Adjustment Act seem to be applicable to contracts made with the Coachella District" (see copy of undated letter attached from the Acting Commissioner to the Regional Director, Boulder City, Nevada), these provisions will be used, for illustrative purposes only, of this type of statute:

> No water shall be *delivered* upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district * * * organized under State law providing for payment by the district * * * of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States * * * Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner

in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; * * * (Italics supplied.)

The language used in the other statutes listed is similar. As will be considered presently, section 5 of the Reclamation Act employs the term "sold" in connection with water rights, in contrast to the term "delivered" in the Omnibus Adjustment Act.

Generally speaking, these excess land provisions represent a firmly established, time-honored, and sound public policy which seeks to achieve the twofold purpose of preventing speculation and of spreading the benefits of a reclamation project among the larger group of smaller landowners rather than confining those benefits to the relatively smaller group of large landowners. These excess land provisions are of general applicability to all reclamation projects in the 17 States enumerated in section 1 of the Reclamation Act of 1902, as amended.

Whenever these general excess land provisions did not fit the special circumstances of a project, or were found not to be adequate enough to check speculation, special excess land provisions were enacted by Congress, applicable only to specific projects. Examples of this type of legislation are:

Interior Department Appropriation Act of May 10, 1926[2] (44 Stat. 453, 465);

2. This act contains the 160-acre limitation but provides the manner, peculiar to the statute, in which excess lands may be conveyed to the United States.

Columbia Basin Antispeculation Act of May 27, 1937[3] (50 Stat. 208), as amended by the

Columbia Basin project Act of March 10, 1943[4] (47 Stat. 14, 16 U.S.C.A. App., sec. 835).

Furthermore, Congress has waived the excess land provisions of the Federal reclamation law, with regard to two projects, in view of the peculiar circumstances involved which threatened to make these projects economically unsound:

Act of June 16, 1938 (52 Stat. 764, 43 U.S.C. sec. 386), with respect to the Colorado-Big Thompson project:

Act of November 29, 1940 (54 Stat. 1219), with respect to the Washoe County Water Conservation District, Truckee storage project, and the Pershing County Water Conservation District, both in Nevada.

In the act of June 16, 1938, *supra,* the language reads:

The excess land provisions of the Federal reclamation laws shall not be applicable to lands which on June 16, 1938, had an irrigation water supply from sources other than a Federal reclamation project and which will receive a supplemental supply from the Colorado-Big Thompson project.

3. This statute contains the following proviso: "That every such contract with any district shall further require that all irrigable land held in private ownership by any one owner in excess of *forty* irrigable acres * * * shall be designated as excess land and as such shall not be entitled to receive water from said project." (Italics supplied.)

4. The limitation here is to *farm* units containing not less than 10 nor more than 160 acres.

The exclusion is equally positive in the act of November 29, 1940, *supra*.[5]

The existence of the two foregoing types of statutes is of tremendous importance in the instant situation and has a direct bearing on the problem before me. Congress in enacting them has shown clearly that the excess land provisions are the heart of the reclamation law. Where such provisions are not sufficiently drastic, Congress has enacted a special excess land law designed to meet the particular situation, as in the Columbia Basin Antispeculation Act. But where reasons of policy militate against the application of the excess land provisions, Congress provides express exemption, as in the Colorado-Big Thompson project.

When the pertinent parts of the Boulder Canyon Project Act are analyzed, it becomes apparent that Congress incorporated therein neither special excess land provisions nor exemption from the excess land provisions generally.[6] Instead, it showed clearly that it intended these provisions

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5. "That the excess land provisions of the Federal reclamation laws shall not be applicable to land in the Washoe County Water Conservation District, Nevada. Irrigated from the Boca Reservoir, Truckee River storage project, Nevada, nor to the Pershing County Water Conservation District, Nevada, irrigated from the Humboldt River Reservoir, and the Secretary of the Interior is authorized to enter into a contract with said district, amending, in accordance with this Act, the contract of December 18, 1936, between the United States and the Washoe County Water Conservation District, and the contract of October 1, 1934, between the United States and the Pershing County Water Conservation District."

6. A 160-acre limitation on lands for *homesteads* within the project is expressly stated in section 9 of the Boulder Canyon Act, as follows: "That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law * * *."

to be applicable to irrigable lands within the project. Section 14 reads:

> This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

Section 12, which is definitive, reads in part:

> * * * "Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto. * * *

These sections will now be analyzed in the light of the general structure of the Boulder Canyon Act, its relationship to the reclamation law, its legislative history, and the few court decisions which have endeavored to interpret it.

When Congress in section 14 made the Boulder Canyon Act "a supplement to the reclamation law," it incorporated into the former statute the 160-acre limitation of the act of June 17, 1902. Webster defines the word "supplement" as "that which completes, or makes addition to, something already organized, arranged, or set apart." (Webster's New International Dictionary, First Edition, 2083.) Thus, the word "supplement," as used in the Boulder Canyon Act, means an addition to legislative enactments already extisting.

With the exception of one unpublished decision by an inferior State court in California — which will be analyzed in detail subsequently — the only case found in which the relationship between the Boulder Canyon Act and the reclamation law was considered is *Six Companies, Inc.* v. *DeVinney*, 2 F. Supp. 693 (D.C. Nev. 1933).

The legal problem in this case may be stated simply. The Six Companies, Incorporated, sought to enjoin a county

assessor in Nevada from collecting State taxes on its personal property and from demanding the payment of poll taxes from its employees. The plaintiff's principal contention for avoiding tax liability was that all of its property and the homes of its employees were inside the Boulder Canyon Project Federal *Reservation,* to which territory the State of Nevada was alleged to have ceded jurisdiction.

In dismissing the bill, the Federal District Court for Nevada observed, in part:

> The statutes referred to are the Reclamation Law and the Boulder Canyon Project Act. The latter act, as before pointed out, is supplementary to the Reclamation Law, except as otherwise therein provided.
>
> * * *
>
> The Boulder Canyon Project Act clearly discloses that the dam and incidental works therein referred to are of a permanent character, and specifically provides that "the title to said dam, reservoir, plant and incidental works shall forever remain in the United States." * * * There is no specific provision in the Boulder Canyon Project Act authorizing the Secretary of the Interior to establish any reservation, and if such authority may be inferred it would be limited to the area covered by the expression last above quoted, including any additional area necessary for administrative purposes.
>
> While, "except as otherwise herein provided," the Project Act is deemed a supplement to the Reclamation Law, a reference to the latter law * * * discloses nothing which the national government might be said to intend the retention of control beyond the consummation of the purposes of the law — the reclamation by means of irrigation of portions of the arid domain. This law comprehends the acquisition by citizens of the United States of the land and water rights. The law generally comprehends that its purposes will be carried out under national direction, but, thereto, always without relinquishment of state jurisdiction. * * *
>
> *Only in the Reclamation Law is there any provision for the establishment of town sites within reclamation proj-*

> *ects or under the authority of the Bureau of Reclamation.* Sections 561-570 (43 USCA). These provisions of the law clearly indicate the intention of Congress that the towns so established will be and remain subject to local state jurisdiction, and lots therein acquired by individual residents, and parks, playgrounds, community centers, and school grounds acquired by the public. (Italics supplied).

In a word, then, the court, in order to find the answer to this question of tax liability, was required to revert to the reclamation law, of which the Boulder Canyon Act is a supplement. The answer clearly was not in the Boulder Canyon Act proper. Therefore, is it not logical to conclude that, if the provisions for the establishment of town sites carried over from the reclamation law to the Boulder Canyon Project Act, the excess-land limitation of 160 acres — one of the most basic provisions of the reclamation law[7] — carried over in like fashion?

While the following State court decision concerns the original Homestead Act and the Enlarged Homestead Act rather than the reclamation law and the Boulder Canyon Project Act, it is sufficiently in point to merit discussion:

> *First State Bank of Shelby* v. *Bottineau County Bank,* 56 Mont. 363, 185 Pac. 162 (1919).

In that case, one Charles R. Wilbur, on July 25, 1913, made final proof upon 320 acres of land which he had entered under the Enlarged Homestead Act of February 19, 1909 (35 Stat. 639). On July 30 of the same year, the Bottineau County Bank recovered judgment against Wilbur. In January 1914, Wilbur received his patent and on April 15, 1914,

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7. How thoroughly the 160-acre limitation permeates both the homestead and the reclamation laws is emphasized in 34 Stat. 116, 43 U.S.C. § 561, cited by the court, as follows: "The Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation law, *not exceeding one hundred and sixty acres* in each case, and survey and subdivide the same into town lots * * *." (Italics supplied.)

he conveyed the land by warranty deed to the First State Bank of Shelby, Montana. In November 1914, the Bottineau Bank attempted to levy execution on the land in satisfaction of its judgment, whereupon the First State Bank sought to restrain the sheriff from making the levy.

The question was whether the provisions of the original Homestead Act of May 20, 1862 (12 Stat. 392), [containing a 160-acre limitation], exempting the land from the past debts of the patentee, carried over to the Enlarged Homestead Act, *supra* [containing a 320-acre limitation]. The language in the original statute provided flatly that no land acquired thereunder could "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The "enlarged" statute was silent in the matter. If the provision of the original statute carried over to the latter act, the attempted levy of the Bottineau Bank was without legal sanction.

The Supreme Court of Montana so held. It reviewed in detail the history and policy of the two statutes. It then summarized the six sections of the Enlarged Homestead Act and concluded:

> * * * It will be seen at once that the Enlarged Homestead Act does not in terms change any of the provisions of the original act. The determination of the principal question before us, therefore, depends upon the proper construction of the Enlarged Homestead Act with reference to the original act.
>
> Was it intended as an independent statute, or was it meant to become a part of the original homestead act as it existed at the time this new measure went into effect? Aside from any other consideration, the bare reading of the act of 1909 would seem to be sufficient to convince one that it could not have been intended as an independent act. * * *
>
> * * *
>
> If the Enlarged Homestead Act was intended as an amendment to the prior homestead laws, then the acts are to be construed as one — as originally in the amended form. The history of this act is fairly conclusive that it

> was never intended to be construed otherwise than as a part of the original homestead law as it was then in force. Without quoting from the committee reports or the debates in the Congress, we think it is apparent from them that it was the intention of the lawmakers by this act to supplement the existing statutes — to improve the homestead laws and encourage the settlement of the vast areas of public lands in the semiarid regions, by increasing the amount of land subject to entry * * *
>
> A supplemental act is one designed to improve an existing statute, by adding something thereto without changing the original text * * *. Supplemental statutes include every species of amendatory legislation which goes to complete a legislative scheme * * *.
>
> *Our conclusion is that the Enlarged Homestead Act is merely supplementary to the original homestead law, and is to be construed as a part of it. It follows that land acquired under it becomes subject to the provisions of section 2296 of the United States Revised Statutes * * * and that the land in controversy in this action could not in any event become liable to the satisfaction of any debt contracted by Wilbur prior to the date his patent was issued.* (Italics supplied.)

The answer to the question in the instant case is contained in the italic lines from the opinion of the Montana Supreme Court. If anything, our case is stronger. Section 14 of the Boulder Canyon Project Act makes that statute "a supplement to the reclamation law." There was no such express statutory connection between the original Homestead Act and the Enlarged Homestead Act. Yet the court found such a connection, even in the absence of express language, and enforced a limitation contained in the original act against land acquired under the supplemental act.[8]

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8. There are many cases which discuss the meaning of the word "supplement" in statutory construction. The prevailing opinion clearly is that the term signifies something which adds to, or completes, or extends that which is already in existence, without changing or modifying the original. *McCleary v. Babcock*, 169 Ind. 228, 82 N.E. 453 (1907); *Lost Creek School Tp. 1, Vigo Co.* v. *York*, 215 Ind. 636, 21 N.E. 2d 58, 60 (1939). See also

The Montana Supreme Court had a clear precedent for its decision. Three years earlier, Federal Judge Bourquin had so held in a bankruptcy case. *In re Auge,* 238 Fed. 621 (D.C.D. Mont. 1916). On that occasion the court observed:

> The bankrupt's contention that all said land is exempt is based on section 2296, R.S. * * * which reads:
>
> "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefore."
>
> The chapter referred to is that of the federal original homestead law, providing for entries of 160 acres or less. Later homestead enactments * * * permit entries for as much as 320 acres — enlarged homesteads — of public lands of certain quality and subject to somewhat different conditions. *These latter are but additions to and amendments of the original law, and upon settled principles all form a whole, to be taken and read together as though the later enactments were part of the original law from the beginning, so as the protection extended by section 2296 is concerned.* Said section provides protection; other sections define the area protected. Changes in the latter affect not the former. Hence enlarged homesteads are "lands acquired under the provisions of this chapter," within section 2296, and are entitled to its protection, even as lesser or ordinary homesteads are. (Italics supplied.)

Even in the absence of the specific provision of section 14 of the Boulder Canyon Project Act, the general structure of this statute reveals that it was not meant to exist independently but rather as a part of the legislative scheme embodied in the Federal reclamation law. For instance, section 1 contains the authorization for the Secretary of the Interior to construct the All-American Canal. The act specifically

Loomis v. *Runge,* 66 Fed. 856, 859 (C.C.A. 5th, 1895); *Swanson* v. *State,* 132 Neb. 82, 271 N.W. 264, 268 (1937); *Edwards* v. *Stein,* 94 N.J. Eq. 251, 119, Atl. 504- 507 (1923); *Bradley & Currier Co.* v. *Loring,* 54 N.J.L. 227, 23 Atl. 685, 686 (1892); *Rahway Savings Institution* v. *City of Rahway,* 53 N.J.L. 48, 20 Atl. 756, 757 (1890).

provides "the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law * * *" In order to determine the extent and mode of reimbursement, the pertinent provisions of the Federal reclamation law must be consulted. Other reference to the Federal reclamation law are found in sections 4(b),[9] section 5,[10] and section 9[11] of the Boulder Canyon Project Act. "It cannot be said that an act so absolutely dependent upon prior acts is an independent statute." *First State Bank* v. *Bottineau County Bank, supra,* at 164. Thus the intent of Congress, to make the Boulder Canyon Project Act part of the legislative pattern of the Federal reclamation laws, is clearly manifest.

9. "Sec. 4(b) * * * Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures *in the manner provided in the reclamation law.*" (Italics supplied.)

10. "Sec. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof * * * upon charges that will provide revenue which, in addition to other revenue accruing *under the reclamation law* and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States * * *." (Italics supplied.)

11. "Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, *in accordance with the provisions of the reclamation law* * * *." (Italics supplied.)

Furthermore, there is no language in the Boulder Canyon Project Act which expressly and directly repeals the excess-land provisions of the reclamation law. As laws are presumed to be enacted with deliberation and with a full knowledge of all existing statutes on the same subject, it is only reasonable to conclude that Congress, in passing the Boulder Canyon Project Act, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two should prove irreconcilable. *United States v. Noce,* 268 U.S. 613 (1925);[12] *United States* v. *Greathouse,* 166 U.S. 601, 605 (1897);[13] *Frost* v. *Wenie,* 157 U.S. 46 (1895);[14] *Henderson's Tobacco,* 78 U.S. 652 (11 Wall.) (1870).[15] The rule has

12. This case held that a provision in section 11 of the act of May 18, 1920 (41 Stat. 601), reading, *"That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services,"* did not repeal section 6 of the act of October 24, 1912 (37 Stat. 569, 594), providing "That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army."

13. The proviso in the act of March 3, 1887, 24 Stat. 505, known as the Tucker Act, * * * "That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," did not repeal so much of section 1069 of the Revised Statutes as provides, "that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; * * *"

14. This decision held that Congress, by enacting the act of December 15, 1880 (21 Stat. 311), opening for settlement certain lands in Kansas within the abandoned Fort Dodge military reservation, "in the absence of express words of repeal," did not impair the rights guaranteed to the Osage Indians by the treaty of 1865.

been well stated in *Red Rock* v. *Henry,* 106 U.S. 596 (1882),[16] at page 601:

> * * * when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest.

Repeals by implication are not favored, and it will not be presumed that, by a subsequent enactment, the legislature intended to repeal former laws upon the general subject, and more especially in a case such as this where the existing reclamation law is referred to directly. See decisions cited in notes 11 through 15 and *State* v. *Bowker,* 63 Mont. 6, 205 Pac. 961, 963 (1922);[17] *Jobb* v. *Meagher County,* 20 Mont. 424, 51 Pac. 1034 (1898).[18]

15. The doctrine of repeal by implication was repudiated. The case held that the act of July 20, 1868, imposing taxes on distilled spirits and tobacco, did not repeal the proviso to section 25 of the Internal Revenue Act of March 2, 1867, which limited to 20 days the time for commencing proceedings to enforce forfeitures.

16. The Minnesota statutes in question both concerned municipal financing.

17. This case, which held that the procedure provided by a State prohibition statute, enacted in 1921, did not by implication supersede procedures established under a general statute, enacted in 1917, contains a comprehensive discussion of the subject. The Montana Supreme Court said: "Repeals by implication are not favored, and it will not be presumed that by a subsequent enactment the Legislature intended to repeal former laws upon the subject not mentioned * * * *and more especially so in the case before us where the existing law appears to have been under consideration to the extent of direct reference thereto, both in the title and in the repealing clause.*" (Italics supplied.)

18. Two Montana statutes concerning the appointment of deputy sheriffs were involved. The court refused to countenance any idea of repeal by implication.

Nothing in the legislative history of the Boulder Canyon Project Act indicates that it was the intention of Congress to abdicate the public policy embodied in the excess-land provisions of the reclamation law and thus open the door to the vicious real estate speculation which was all ready to take advantage of the Boulder Canyon project lands. Congress was fully aware of this danger, and it was commonly assumed by Congress that the Boulder Canyon Project Act was subject to the excess-land provisions.[19]

In the light of the foregoing authorities, it is my conclusion that the Boulder Canyon Project Act is supplementary to the reclamation law, except as otherwise therein provided, and, accordingly, the excess-land provisions are applicable to the Coachella Valley County Water District lands.

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19. See, for example, the following discussion in the House of Representatives [69 Cong. Rec. 9626 (1928)].

"Mr. MORTON D. HULL. The language of the bill is not clear to me.

"Mr. DOUGLAS of Arizona. The bill authorizes the Secretary of the Interior to construct a canal to the Imperial and Coachella Valleys. The appropriation bill in specific terms is only for the all-American canal to the Imperial Valley. If the Coachella Valley, where there are public lands, and if the areas in the vicinity of the Imperial Valley are to be brought in under cultivation, then the Congress must appropriate another $18,000,000.

"Mr. SWING. Mr. Chairman, if the gentleman will permit, I think perhaps the gentleman from Illinois [Mr. Morton D. Hull] is referring to the limitation on the area that one person can hold after the canal is built, requiring that any large holding must be broken up, and if it is not broken up, it must be turned over to the Secretary of the Interior, who may sell it at an appraised price, so that no one will hold over a maximum of 160 acres.

"Mr. DOUGLAS of Arizona. That is in the bill. I thank the gentleman. *In this connection I might state also that the Imperial Valley and southern California is deluged with advertisements now 'Buy land in Imperial Valley now; speculate on Boulder Dam.'*" (Italics supplied.)

It now becomes necessary to examine and refute the principal arguments against the foregoing conclusion.

It has been contended, for example, that in view of the language of section 14 of the Boulder Canyon Project Act the reclamation law applies only to the "construction, operation, and management of the works." This contention must, by necessity, be based either on the doctrine of *ejusdem generis* or on the doctrine of *expressio unius est exclusio alterius.* These doctrines belong more properly in the field of contract construction than statutory construction. The courts have repeatedly held that these doctrines are not of universal application, but serve only as an aid in the ascertainment of the meaning of the law, and must yield whenever a contrary intention of the lawmaker is apparent. *Buringer* v. *Philippine Islands,* 277 U.S. 189, 206 (1928); *Helvering* v. *Stockholm Enskilda Bank,* 293 U.S. 84, 89 (1934). The contrary intent of Congress is apparent in section 14 of the Boulder Canyon Project Act.

The unreported decision of the Superior Court for Imperial County, California in *Hewes* v. *All Persons* (May 24, 1932), has been cited as precedent for the nonapplicability of the excess-land provisions. The Superior Court held that the contract between the United States and the Imperial Irrigation District, dated December 1, 1932, providing for the construction of the All-American Canal, and all proceedings leading to its execution, are valid in all particulars. The jurisdiction of the court was invoked pursuant to the following provision of the contract:

> Article 31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and condition of this contract unless and until confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. * * *

The court made the following finding No. 35:

That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

The court amplified this finding in its decision as follows:

Use of Water not Limited by Reclamation Law.

Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres in any one landowner, thus preventing him from obtaining water for all of his land, that he will be required to pay water assessments upon all of his land but will be able to get water for only 160 acres, and that the contract takes from him, without compensation, his water right for all of his land in excess of 160 acres.

The water right of neither the defendant Malan nor of any other person in the Imperial Irrigation District may be taken by the district or by the government without compensation. Furthermore, section 5 of the Reclamation Law does not apply in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. Section 1 of the Boulder Canyon Project Act provides that the expenditures for the main canal and appurtenant structures shall be "reimbursable, as provided in the Reclamation Law," and in section 4(b) it is required that before any money is appropriated for the construction of the main canal and

appurtenant structures, the secretary shall make provision for revenues adequate in his judgment to secure payment of all expenses of construction, operation, and maintenance "in the manner provided in the Reclamation Law." Section 14 provides that the Boulder Canyon Project Act "shall be deemed a supplement to the Reclamation Law, which said Reclamation Law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." The act does not adopt the Reclamation Law or any of its provisions, except as above stated, and the authority of the secretary with reference to the delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the secretary to contract for the delivery of water "under such general regulations as he may prescribe" and provides that "contracts respecting water for irrigation and domestic uses shall be for permanent service." Article 30 of the contract reads as follows: "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder." There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered.

The reading of Article 31 of the contract shows that the jurisdiction of the court was invoked solely "for a judicial confirmation of the authorization and validity of the contract." Since the court was not called upon to determine the applicability of section 5[20] of the Reclamation Act to the contract it thus clearly exceeded its authority. Accordingly, its finding No. 35, and that part of the opinion referring to it, must be regarded as dictum. This dictum is

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20. This section provides: "No right to the use of water for land in private ownership shall be *sold* for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made." (Italics supplied.)

narrowly confined to the question of the applicability of section 5 of the reclamation law. Even assuming for purposes of discussion that the California court might be right as to the nonapplicability of section 5, this decision completely disregards the whole legislative scheme of the Federal reclamation laws on the subject of excess-land laws, e.g., section 46 of the Omnibus Adjustment Act, *supra;* the Warren Act, *supra.*

Appeal was instituted by the Imperial Water District and by stipulation of the parties, the appeal was dismissed by the Supreme Court of California on February 26, 1934. The outcome of this action was of utmost importance to the United States because the construction of the All-American Canal was delayed because of a decision of the Comptroller General who held (A-32702, December 6, 1933) that no funds might be expended for construction until the contract had been found valid by the State court of last resort.

These circumstances furnish the background and explanation for a letter of former Secretary of the Interior, Hon. Ray Lyman Wilbur, dated February 24, 1933. In this letter the Secretary stated:

> Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that the limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

A study of the letter reveals that it completely disregards all other excess-land provisions except section 5 of

the Reclamation Act of 1902.[21] This construction of the congressional intention is not borne out by a review of the proceedings of Congress. Senator Pittman introduced, on December 14, 1928, the following amendment:

> That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys.[22]

The following discussion ensued:

> Mr. PITTMAN.***
>
> * * *
>
> I will state that originally I entered a motion to strike out that whole proviso. However, as the representatives of Imperial Valley desired [sic.] to stay in, and are willing to limit its effects entirely to that valley, I defer to their wishes.
>
> Mr. JOHNSON. I have no objection to the amendment that is suggested.
>
> Mr. KING. Mr. President, may I inquire of the Senator from Nevada whether that is similar to the amendment which was offered yesterday? I have just entered the Chamber, and did not hear the entire statement of the Senator. The purpose, as I understand, of the amendment, is to relieve Imperial Valley from any charges whatever, except such as would be imposed under the reclamation act.
>
> Mr. PITTMAN. That is the opinion of the representatives of Imperial Valley, and that is the reason why it is put in that form. They feel that in some way that paragraph is more in harmony with the reclamation act.

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21. While this section, set out in footnote 20, *supra,* limits the *sale* of water rights to tracts of 160 acres or less, section 46 of the Omnibus Adjustment Act, set out previously in the text of this opinion, uses the term "delivered" instead of "sold."

22. 70 Cong. Rec. 575 (1928); the amendment was accepted and appears in exactly the same wording as the last proviso of § 1 of the Boulder Canyon Project Act.

There is some doubt in my mind as to that; but, as they are willing to limit its effect entirely to their own valley, it is not a matter of such great concern to me.

Mr. KING. Let me ask the Senator, in my own time, if he does not have the time, whether in his opinion the new lands which it is expected will be brought under cultivation in the Coachella or Imperial Valleys ought to be exempted from contribution to the construction of the dam?

Mr. PITTMAN. There is no charge in this bill whatever on the Imperial Valley land or the Coachella Valley land for the construction of the dam or power house.

Mr. KING. I know that, but inquire whether the Senator believes the users of water should exempt [sic.]. Under the reclamation projects, as the Senator knows, those who make contracts for the purchase of land or the purchase of water are required to pay for both water and the construction of canals and dams, and the amount which they pay includes all of the expenses of the Government. Here we are asking the settlers to pay only for the canal, and exempting them from paying anything whatever toward the construction of the dam.

Mr. PITTMAN. I admit this is an exception to the practice under the reclamation act in that it relieves this land from the payment of any part of the cost of the dam. It simply limits it to the cost of the canal. In this particular case the Senate has allocated $25,000,000 toward the cost of the dam. It is true that the $25,000,000 must be paid back, but the payment may be postponed until the end of the period of amortization. I think that in view of the fact that this dam has to be built for flood-control purposes, and in view of such allocation, we should exempt those lands in Imperial Valley from the payment of any part of the cost of that dam.

Mr. KING. Then it is apparent that the residents of Imperial Valley will have the benefits of flood control, storage water, the certainty of getting an equated flow, and will be required to pay for nothing except the cost of the All-American canal.

Mr. PITTMAN. That is the fact; but I think the circumstances warrant it.

Mr. KING. Does the Senator think there should be no distinction between those who have vested rights, who have already appropriated water in the Imperial Valley, and those who have no vested rights, and have never appropriated any water?

Mr. PITTMAN. No; I do not think we can have a successful reclamation project if we attempt to draw that distinction, because undoubtedly even those with the vested rights will have to pay a part of this cost if the Government is to be repaid —

Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley district lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently asumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated.

Furthermore, an examination of the files reveals that the letter of the former Secretary was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provisions "provided, that such ruling would be that the 160-acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter (February 24, 1933), President Roosevelt was inaugurated.

In summary, then, I reach the conclusion that in view of section 14 of the Boulder Canyon Project Act, which makes that act supplementary to the Federal reclamation law, the excess-land provisions contained therein are car-

ried into operation with respect to the Coachella Valley water lands and should be incorporated in the contracts presently under consideration.

Respectfully,

FOWLER HARPER,
Solicitor.

Approved: May 31, 1945
HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX I

Mr. H. C. HERMANN
Department Quartermaster Adjutant
Veterans of Foreign Wars
107 Veterans Building
San Francisco 2, California

April 27, 1948

MY DEAR MR. HERMANN:

Pursuant to advice in our letter of March 18, the questions which you asked in your letter of February 27 concerning the Imperial Irrigation District have been thoroughly considered in the Bureau of Reclamation.

As you have suggested in your letter, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District to the effect that, in the factual situation presented there, in so far as described in that letter, the 160-acre limitation of the Federal Reclamation Law would not result in restrictions of the acreage of land in one ownership eligible to receive water from the project. As you have also observed, the Solicitor for the Department on May 31, 1945, considered the applicability of the acreage restrictions under the Boulder Canyon Project Act with reference to the Coachella Valley County Water District. In that opinion the Solicitor made it clear that, based upon the situation placed before him with respect to the Coachella Valley County Water District lands, the acreage limitations

of the Federal Reclamation Law are applicable. You will understand, I think, that even though both of the irrigation districts referred to are served from the All-American Canal under the same statute, the Solicitor's opinion, approved by the Department, was only with respect to the Coachella case. Therefore, simply as a matter of technical ruling, the approved opinion did not itself affect the situation with respect to the Imperial case.

Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.

If you have further questions in connection with these matters, please do not hesitate to advise us.

Sincerely yours,

J. A. KRUG,
Secretary of the Interior.

APPENDIX J

February 5, 1958

Hon. J. Lee Rankin
Solicitor General
Department of Justice
Washington 25, D.C.

Dear Mr. Rankin:

I have received your letter of January 24, and its enclosure, in connection with the case of *Arizona* v. *California, et al.*, No. 10 Original in the Supreme Court of the United States.

The question posed in the course of oral argument by the State of Arizona is whether the so-called 160-acre limitation of the Federal Reclamation Law is applicable to the lands of the Imperial Irrigation District. I am, of course, familiar with the views expressed by Secretary Wilbur in his letter of February 24, 1933, to the Imperial Irrigation District, and I am also familiar with the views expressed by former Solicitor Harper in his opinion M-33902, dated May 3, 1945. However, since assuming my duties as Solicitor of the Department last year, I have not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so. My reasons for viewing the matter in this light will be briefly stated.

The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been pro-

posed or taken either by the preceding administration or by this one to recognize or enforce application of the 160 acre limitation to the lands of the Imperial Irrigation District.

At the time of court confirmation of the Imperial water contract (*Hewes* v. *All Persons* (May 24, 1933), unreported, before the Superior Court for Imperial County, California), defendant Malan, the owner of 210 acres, attacked the validity of the contract on the ground that the 160 acre limitation would prevent water delivery to all of his land. The court found the contract valid in all respects and made the following finding No. 35.

> That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

The United States was not a party to that confirmation proceeding. Article 31 of the Imperial water contract reads as follows:

> CONTRACT TO BE AUTHORIZED BY ELECTION AND CONFIRMED BY COURT
>
> ARTICLE 31. The execution of this contract by the district shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such procedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the

United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the clerk of the Court in which confirmatory judgment is obtained.

The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect.

By letter of April 27, 1948, the Secretary of the Interior, responding to an inquiry made by the Veterans of Foreign Wars concerning the apparent inconsistency of the application of the 160 acre limitation to the lands of the Imperial Valley and to the lands of the Coachella Valley, stated in part:

> Concerning, however, the substantive questions which relate alike to both Districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.
>
> To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise

> be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.

Further, it may be significant to note that the 1932 Imperial water contract was amended in 1952 after extensive negotiation to accommodate the Imperial Dam and All-American Canal operations to the Mexican Water Treaty of 1944. The amendatory contract of 1952 in no way seeks to revive or treat with the application of the 160 acre limitation.

Quite apart from the timeliness of now probing anew the application of the 160 acre limitation, I believe there are other pertinent aspects of the matter which warrant careful consideration. I have in mind particularly the relevance of the 160-acre limitation to the primary issue of determining as between Arizona and California their respective entitlements to water, the position of the Government regarding the validity of its water contracts and perhaps the standing of Arizona to inject the question of the application of the 160 acre limitation. I shall discuss these matters briefly in the order mentioned.

Under section 4 of the Boulder Canyon Project Act and the California Self-Limitation Act, California is entitled to the beneficial use of 4,400,000 acre-feet of III(a) water, plus one-half the surplus. This has always been the view of this Department; see 54 I.D. 593 (1934). What lands that water is delivered to is a matter first, of internal California law and second, and of more importance, of contracts between the California interests and the United States. The failure of the parties, if it be a failure, to include all necessary provisions in the Imperial contract cannot operate to enlarge the Arizona entitlement. She must stand on the strength of her own title and not the weakness of her opponent's title. Accordingly, we believe the 160-acre limitation issue is not one relevant to the rights of the states under the law of the river.

In its Petition of Intervention (Paragraph XXXI, pages 27 and 28) the United States asserts that its water contracts are valid and binding and denies "each and every allegation of the parties to the cause in their respective pleadings with reference to these treaties, conventions, compacts, documents, laws and contracts which in any way contravenes, contests, or challenges the validity of them or any provision or provisions of them; * * *." As previously indicated, I believe we cannot take a different view at this time.

The water delivery contract between the United States and the State of Arizona, dated February 9, 1944, clearly recognizes the right of the United States to contract with the agencies of the State of California for the storage and delivery of water from Lake Mead. Article 7(h) of that contract reads:

> (h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an Act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

Since the Imperial water contract was nearly 12 years old and well-known to the State of Arizona at the time the Arizona water contract was executed, it would appear reasonable to conclude that the above-quoted language was, at least so far as Arizona is concerned, a recognition of the right of a Secretary to have executed the Imperial water contract of December 1, 1932.

In keeping with your request I am attaching a copy of the document requested entitled "Land Ownership Survey on Federal Reclamation Projects." There is also attached for your information a copy of Secretary Krug's letter of

April 27, 1948, from which I have heretofore quoted. We shall be glad to discuss the subject of your inquiry if that seems desirable.

Sincerely yours,

ELMER F. BENNETT,
Solicitor.

APPENDIX K

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 10 ORIGINAL

October Term 1957

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, ET AL., DEFENDANTS,

UNITED STATES OF AMERICA and STATE OF NEVADA, INTERVENERS,

STATE OF UTAH and STATE OF NEW MEXICO, IMPLEADED DEFENDANTS.

Before the Honorable Simon H. Rifkind, Special Master

MEMORANDUM IN BEHALF OF THE UNITED STATES WITH RESPECT TO RELEVANCE OF NON-COMPLIANCE WITH ACREAGE LIMITATIONS OF RECLAMATION LAW

for Imperial County, California, on July 1, 1933,[3] found and concluded that, without distinguishing between privately

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3. California Exhibit No. 207.

owned and public lands which might be opened for entry, there is no limit on the quantity of lands in single ownership which might be served with irrigation water from the All-American Canal; and that by opinion No. M-33902 dated May 31, 1945[4] the Solicitor for the Department of the Interior, with Secretarial approval, repudiated the conclusion reached in the Wilbur letter of 1933 and concluded that the acreage limitation provisions of the reclamation law were fully applicable to lands under the All-American Canal within the Coachella Valley County Water District.

But, we submit, the Special Master's disposition of the Arizona request and of the California objections thereto neither requires nor justifies a resolution of the question whether the acreage limitation provisions of the reclamation law apply to lands in the Imperial Irrigation District or the question whether the decree of *Hewes, et al.* v. *All Persons, et al.* precludes further consideration of that question. For even though an affirmative answer to the first of those questions and a negative answer to the second be assumed, the California objections to the Arizona request should nevertheless be sustained.[5] A demonstration of the reasons why this is believed to be so is the principal burden of this memorandum.

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4. Arizona Exhibit 249 for identification.

5. It is not the purpose of the United States to avoid taking a position on these questions, but simply to avoid unnecessary argument. Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion, as well as for others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley just as are the similar limitations relating to public lands opened for entry within the District. (See, e.g., section 9 of the Boulder Canyon Project Act, 43 U.S.C. § 617h.) Clearly, the All-American Canal is a reclamation project (36 Op. Atty. Gen. 121, 130, 138, Dec. 26, 1920), subject to all the provisions of "Reclamation law," as defined in section 12 of the Boulder Canyon Project Act (43 U.S.C. § 617k), except as such provisions are by the Project Act made inapplicable. Section 1 of the Project Act (43 U.S.C. § 617) reads "the expendi-

tures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law." Section 14 (43 U.S.C. § 617m) is even more explicit. "This act shall be deemed a supplement to the reclamation laws, *which said reclamation laws shall govern the* construction, *operation, and management* of the works herein authorized, except as otherwise herein provided." (Italics supplied.) It is at best no more logical to argue, as the California defendants have, that the omission to include in the Project Act an express limitation with respect to lands in private ownership indicates a Congressional intent that no such limitation should apply than it is to argue that the express provision was deleted because it was thought section 14 was entirely adequate to accomplish the purpose. The express limitation with respect to public lands contained in section 9 is not inconsistent with such an assumption. For the express provision of section 9 with respect to the opening of public lands for entry made necessary the accompanying limitation on the size of the tracts. We think the reasoning whereby the conclusion of non-applicability was reached in Appendix A to the "King Report" (quoted at page 47 *et seq.* of the Brief of Imperial Irrigation District on this question) is utterly devoid of logic and of any other basis for support. Other references to the controlling effect of the provisions of reclamation law are to be found throughout the Project Act. In addition to Secretary Wilbur's failure to consider all of the possibly applicable provisions of the various supplements to the Reclamation Act of 1902, there are other inadequacies in his premises for the conclusion he stated. Among them are his assumption, without analysis, that "lands now cultivated" in the District had as against the United States vested water rights, and his assumption that those lands would receive through the works constructed by the Government only "the continued flowage of the water covered by the right * * *."

With respect to the Superior Court's findings and conclusions in *Hewes, et al.* v. *All Persons, et al.*, we shall limit our comments at this point (1) to the statement that the United States had not, and has not, consented to be sued in cases of that kind and that its officers could therefore not have submitted the United States to the jurisdiction of the Court even had they attempted to do so — which they did not, and (2) to the observation that the Superior Court's attempted determination of the applicability to lands in the District of the acreage limitation provisions went far beyond

APPENDIX L

August 7, 1961

Honorable Stewart Udall
Secretary of the Interior
Washington 25, D.C.

Dear Mr. Secretary:

I have had some complaints from Southern California that the acreage limitation provisions of the Reclamation law have not been enforced in Bureau of Reclamation Projects in the Coachella and Imperial Valleys.

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the direction of Congress "That no contract with an irrigation district under this act shall be binding on the United States *until the proceedings on the part of the district for the authorization of the execution of the contract* with the United States shall have been confirmed by decree of a court of competent jurisdiction * * *." (Act of May 15, 1922, section 1, 42 Stat. 541; 43 U.S.C. § 511. See also Act of May 25, 1926, § 46; 44 Stat. 649, 650; 43 U.S.C. § 423e.)

The question of the general applicability in California of the acreage limitation provisions of the reclamation law and the question whether the United States can be a party defendant to "validation" proceedings such as *Hewes, et al.* v. *All Persons, et al.*, are now pending before the Supreme Court of the United States in the case of *Ivanhoe Irrigation District* v. *All Persons, et al.*, 47 Cal. 2d 597, 306 P. 2d 824, 355 U.S. 803, and related cases. Although the United States did not appear in the State court proceedings in the case except as *amicus curiae* in support of the State's petition to the California Supreme Court for rehearing, it is planned that an *amicus curiae* brief will be filed with the United States Supreme Court. None of the briefs on that appeal has yet been filed. For this reason it is believed inappropriate, as well as unnecessary for the reasons stated in the text, to argue at length here the question adverted to in this footnote.

Would you kindly advise me if these areas are subject to acreage limitation provisions, and if so, the status of land ownership within them?

Sincerely yours,

CLINTON P. ANDERSON,
Chairman.

APPENDIX M

May 15, 1962

Hon. Clinton P. Anderson
Chairman, Committee on Interior and Insular Affairs
United States Senate, Washington, D.C.

Dear Mr. Chairman:

On August 7, 1961, you made inquiry as to whether lands in the Coachella and Imperial Valleys are subject to acreage limitation provisions of the Federal Reclamation laws and, if so, the status of land ownership within them. Unfortunately, your letter was misplaced.

The Coachella Valley County Water District is in compliance with the land limitation provisions of the Federal Reclamation laws. The Coachella distribution system contract of December 22, 1947, includes provisions implementing the acreage limitation provisions through recordable contracts as specified in section 46 of the Act of May 25, 1926. No acreage limitation provisions were included in the Coachella All-American Canal contract of October 15, 1934, whereby the Coachella County Water District contracted for capacity in the Imperial Dam and the All-American Canal and for the repayment of a proportionate share of the costs of those facilities. Omission of land limitation provisions in the 1934 contract was no doubt based upon a ruling by Secretary of the Interior Wilbur made in 1933 in the case of the Imperial Irrigation District. Further comment upon Secretary Wilbur's ruling is made hereafter in this letter.

In connection with negotiation of the Coachella distribution contract, the Solicitor of the Department made a thorough review of the possible applicability of land limitation provisions and in an opinion dated May 31, 1945 (copy enclosed) the Solictor held that the land limitation provisions of the Federal Reclamation laws were applicable to lands in the Coachella County Water District. Accordingly, as above indicated, land limitation provisions were included in the distribution system contract.

Currently available records indicate that of the 923 ownerships in the Coachella District larger than five acres, which comprise an aggregate total of 74,718 irrigable acres, none contain excess lands. Hence, there is no indication of violation of the acreage limitation provisions of reclamation law in the Coachella service area.

By reason of Secretary Wilbur's ruling of 1933, records have not been maintained of excess ownerships in the Imperial Irrigation District. Consequently, we are unable to advise with respect to the extent of noncompliance with excess land limitations in the Imperial District, but we would assume from general knowledge that there are considerable large holdings and that they have been increasing.

With respect to the applicability of excess land limitations to lands in the Imperial Irrigation District, as noted above, Secretary Wilbur in 1933, shortly before he left office, ruled that lands within the District did not come under the statutory restrictions. The rationale of the Solicitor's opinion of May 31, 1945, however, challenges the validity of Secretary Wilbur's view. In a letter of April 27, 1948 (copy enclosed) then then Secretary of the Interior advised the Veterans of Foreign Wars that the Department did not plan to take any action to reverse the Wilbur ruling as to the Imperial Irrigation District. This position taken by the Department in 1948 was called to the attention of the Department of Justice by the enclosed copy of a letter from the then Solicitor of this Department to the Solicitor General of the United States, dated February 5, 1958. However, the Department of Justice in pleadings filed in the case of *Arizona* v. *California* has expressed disagreement with Secretary Wilbur's ruling. We enclose in this

connection a copy of a memorandum filed by the Solicitor General in *Arizona* v. *California*. You will find of particular interest footnote 5 commencing on page 2 and footnote 45 on page 30a in the Solicitor General's opinion.

The continuing press of other matters has caused us to defer a current study of the Imperial situation. We hope, however, to go into it in the future, as circumstances of available staff and time permit.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, v. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant*.	NO. 67-7-K CIVIL COMPLAINT

COMES NOW plaintiff and for cause of action against defendant alleges as follows:

1. This is a civil action brought by the United States. This Court has jurisdiction under Title 28, section 1345, United States Code.

2. Imperial Irrigation District is an irrigation district created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at El Centro, California.

3. The Act of December 21, 1928 (45 Stat. 1057), commonly known as the "Boulder Canyon Project Act," authorized the Secretary of the Interior (herein referred to as the Secretary) to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, and a diversion dam, main canal and appurtenant structures connecting such diversion dam with Imperial and Coachella Valleys in California. Pursuant to this Act, the Secretary constructed Hoover Dam, at Black Canyon, and incidental works, completing the construction of said dam in 1935. On February 1, 1935, the Secretary began storing water in Lake Mead, the reservoir created by Hoover Dam, and since that date has continuously operated and maintained Hoover Dam for the purposes of regulating the flow of the Colorado River, water storage and for other purposes as required by said Act.

4. Section 4(b) of the Boulder Canyon Project Act provides that before any money is appropriated for the construction of the All American Canal and appurtenant structures, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, to insure repayment of the construction, operation and maintenance of said project works in the manner provided in the reclamation law.

5. Section 5 of the Boulder Canyon Project Act authorizes the Secretary, under such general regulations as he may prescribe, to contract for the storage of water in Hoover Dam and for the delivery thereof, and provides that no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as stated in the Act.

6. Section 14 of the Boulder Canyon Project Act provides that the Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation and maintenance of the works authorized by the Act. Section 12 of said Act defines the reclamation law as that certain act of the Congress of the United States, approved June 17, 1902, entitled "An Act

appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the acts amendatory thereof and supplemental thereto.

7. At the time the Boulder Canyon Project Act was enacted and became effective, and at the present time, section 46 of the Act of May 25, 1926, 44 Stat. 649, was and is a part of the reclamation law, as defined in the Boulder Canyon Project Act.

8. Section 46 of the Act of May 25, 1926, provides in pertinent part that:

> No water shall be delivered upon the completion of any new [reclamation] project until a contract * * * in form approved by the Secretary of the Interior shall have been made with an irrigation district * * * organized under State law providing for payment by the district of the cost of constructing, operating, and maintaining the [project] works during the time they are in control of the United States * * *. Such contract * * * shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior * * *.

The foregoing section 46 is hereinafter referred to as the land limitation provisions of reclamation law.

9(a). On December 1, 1932, the United States and Imperial Irrigation District, acting pursuant to the Boulder Canyon Project Act, entered into a contract, a copy of which is annexed hereto as Exhibit A, providing for con-

struction by the United States of a diversion dam in the main stream of the Colorado River, known as Imperial Dam, and a canal and appurtenant structures connecting Imperial Dam with Imperial and Coachella Valleys, California, known as the All American Canal, and requiring defendant to pay to the United States the actual cost of constructing such works. Article 8 of said contract, Exhibit A, also required defendant, upon notice of completion from the Secretary, to assume the care, operation and maintenance of Imperial Dam and the All American Canal, with the United States reserving the right, from time to time, in the Secretary's discretion, to resume operation and maintenance of Imperial Dam. Also, under Article 20 of said contract, Exhibit A, the United States reserved the right to assume control of all or any part of any of the works transferred to defendant, and to care for, operate and maintain the same, for as long as the Secretary deemed necessary or advisable, if in his conclusive judgment, defendant did not carry out the terms and conditions of the contract to their full extent and meaning. Section 17 of said contract, Exhibit A, required the United States to deliver to defendant, at a point in the Colorado River immediately above Imperial Dam, from storage in Lake Mead, the waters of the Colorado River apportioned to it as provided in said contract.

9(b). On March 4, 1952, said contract, Exhibit A, was amended and supplemented by a contract, a copy of which is annexed hereto as Exhibit B. By Article 10 of Exhibit B it was provided that the United States would retain the care, operation and maintenance of certain facilities at Imperial Dam and along the All American Canal including the California Sluiceway at Imperial Dam, which controls the passage of Colorado River water through the Dam and the quantity of water that is available for diversion into the All American Canal, the headworks at the east end of Imperial Dam, and associated desilting works, for the diversion of Colorado River water for users in Arizona, and all turnouts in the Imperial Dam — Pilot Knob section (Engineer Station 1098) of the All American Canal serving the Yuma Federal Reclamation Project.

10. Pursuant to Exhibit A, the United States constructed Imperial Dam and the All American Canal. In 1940, the

United States, while retaining the care, operation and maintenance of these facilities, commenced delivering and diverting stored Colorado River water at Imperial Dam and carrying such water through the All American Canal for use of defendant. Pursuant to Exhibit A, the Secretary transferred to defendant on March 1, 1947, the care, operation and maintenance of the main branch of the All American Canal west of Engineer Station 1098. Pursuant to Exhibit B, on May 1, 1952, the Secretary transferred to defendant the care, operation and maintenance of the works east of Engineer Station 1098, with exceptions and limitations described in subparagraph (b) of paragraph 9 of this complaint. Since 1942, defendant's entire water supply from the Colorado River has been released from storage in Lake Mead, diverted at Imperial Dam, and carried through the All American Canal. Notwithstanding the above-described transfer of the care, operation and maintenance to defendant, title to Imperial Dam and the All American Canal, as well as to Hoover Dam, is in the United States.

11. Said contract, Exhibit A, does not expressly set forth the land limitation provisions of reclamation law. Article 24 of said contract, however, does reserve to the Secretary the right to prescribe and enforce rules and regulations, not inconsistent therewith, governing the diversion and delivery of water to defendant with the right in the Secretary to modify, revise or extend such rules or regulations as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of the contract, or to protect the interests of the United States.

12. On February 24, 1933, the then Secretary of the Interior, Ray Lyman Wilbur, notified Imperial Irrigation District, by letter, that, in his opinion, the land limitation provisions of the reclamation law did not apply to privately owned land in the district.

13. By Memorandum Opinion No. M-36675, dated December 30, 1964, the Solicitor, Department of the Interior, advised the Secretary that the conclusion reached in said letter from Secretary Wilbur was erroneous and that privately owned irrigable lands in Imperial Irrigation District

are subject to the land limitation provisions of the reclamation law. On December 31, 1964, the Secretary publicly announced that:

> I am instructing Commissioner of Reclamation Floyd E. Dominy to commence discussions with the District in order to implement Solicitor Barry's opinion. We expect these discussions to begin immediately and to conclude in a reasonable period of time. On that basis, Reclamation will continue to deliver water to the District during this interim period.

Thereafter discussions to implement Solicitor Barry's Opinion were held with representatives of Imperial Irrigation District, but such discussions did not succeed in obtaining defendant's compliance with the land limitation provisions.

14. Numerous persons hold in private ownership and are irrigating lands in excess of one hundred and sixty irrigable acres situated in Imperial Irrigation District, and defendant is delivering, for the irrigation of such excess land, water released from storage at Lake Mead, delivered to defendant at Imperial Dam and transported through and by means of the All American Canal. No recordable contracts for the sale of such excess lands have been executed with the owners thereof.

15. Defendant denies that the land limitation provisions of reclamation law apply to it or that such provisions apply to the owners of excess lands within its boundaries, notwithstanding that the water used for the irrigation of the lands within the District is released from storage in Lake Mead, diverted at Imperial Dam, and carried through the All American Canal, from which it is distributed to landowners within the Imperial Irrigation District. Defendant denies the authority of the Secretary to require it, as a condition to future use and enjoyment of water stored at Lake Mead and of Imperial Dam and the All American Canal, to withhold delivery of water so diverted and carried to owners of excess lands within the District who have not executed recordable contracts for the sale of such excess lands as provided in said land limitation provisions.

Defendant has refused to require its water users who are excess landowners to execute recordable contracts for the sale of such excess lands as a condition to water delivery. Owners of a substantial portion of the excess irrigable lands being supplied with irrigation water by defendant, through their representatives, have advised the Department of the Interior that they refuse to execute recordable contracts until and unless it is judicially determined that the land limitation provisions of reclamation law are applicable to such water deliveries.

16. There exists an immediate and substantial controversy with defendant, whose legal interests are adverse to those of plaintiff, as to whether defendant is required to comply with the land limitation provisions of reclamation law in delivering Colorado River water, stored, diverted and transported as aforesaid, to privately owned lands situated in Imperial Irrigation District.

17. In order to resolve the controversy with defendant, plaintiff must either resume control of the facilities of the All American Canal now being operated by defendant and withhold delivery of water to defendant until it is in compliance with the land limitation provisions of reclamation law, or seek a judicial determination of the applicability of such provisions. Resumption of control of the facilities and termination of water deliveries would cause hardship to those landowners within the District, who, not holding excess lands, are not directly involved in the controversy. It is, therefore, in the public interest to secure a judicial resolution of this controversy.

WHEREFORE, plaintiff prays that the Court hold, adjudge and decree that the defendant is bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to all privately owned lands within the boundaries of Imperial Irrigation District.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants,* JOHN M. BRYANT, ROBERT C. BROWN, THEODORE B. SHANK, HAROLD A. BROCKMAN, CLARA MARIE GUTIERREZ, CHARLES E. NILSON, KAKOO D. SINGH, STEPHEN H. ELMORE and JOHN KUBLER, JR., *Landowner Defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Valley in California.*	NO. 67-7-K CIVIL ANSWER OF LANDOWNER DEFENDANTS

Defendants John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr. and each of them (hereinafter "landowner defendants"), both individually and as members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District in California and devoting to beneficial use water transported via the All-American Canal and delivered to them by defendant Imperial Irrigation District, and for and on behalf of themselves and of all members of said class, for answer to the complaint herein, admit, deny and allege as follows:

I. RESPONSE TO ALLEGATIONS OF COMPLAINT

1. Allege that these landowner defendants and each of them are residents of and within Imperial Irrigation District and own and hold, in private ownership, more than 160 acres of irrigable land lying within the boundaries of said District. Said landowner defendants and each of them are the owners and holders of vested rights and of present perfected rights and to waters diverted from the Colorado River since 1901, transported initially through the Alamo Canal, and since 1942 through the All-American Canal, and delivered to them by the Imperial Irrigation District through its distribution system established long prior to 1929. As used herein, "vested rights" shall mean fixed and established rights in and to (a) the appropriation, diversion and transportation and (b) the beneficial use and continued supply of the waters, of the Colorado River without acreage limitation, such rights being protected and guaranteed by the Reclamation Act of 1902, as amended and supplemented, the Boulder Canyon Project Act and by the Due Process clause of the Fifth and Fourteenth Amendments of the United States Constitution and of § 13 of Article I of the Constitution of California, and by each of same. Included within said "vested rights" are "present perfected rights," which shall have a meaning herein in accordance with the definitions contained in the Decree in *Arizona* v. *California,* 376, 340 (1964), namely water rights acquired in accordance with state law, which rights have been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works and which rights were existing as of June 25, 1929. The vested and present perfected rights of landowner defendants and the class to

which they belong have been exercised since long prior to June 25, 1929 and are now being exercised by the actual diversion of specific quantities of water that have been applied by way of beneficial use to defined areas of land owned, farmed and operated by members of the class to which these landowner defendants belong and which they represent. As set forth more fully hereinafter, these landowner defendants and the class they represent have acquired or held, and have improved and farmed, their lands in justifiable reliance upon the ruling of Secretary of the Interior Wilbur dated February 24, 1933 that the lands lying within the boundaries of the Imperial Irrigation District, "having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned."

2. Admit the allegations contained in Paragraphs 1 and 2 of the complaint.

3. Admit the allegations of Paragraph 3 of the complaint, and allege as follows: Allege that among the "other purposes" for which the Secretary of the Interior has operated and maintained Hoover Dam was and is the satisfaction of vested and of present perfected rights to the beneficial use of the waters of the Colorado River in pursuance of the Colorado River Compact of November 24, 1922, found at 70 Cong. Record at 324 (1928), all as provided in the Boulder Canyon Project Act of 1928.

4. Admit the allegations contained in Paragraphs 4, 5 and 6 of the complaint.

5. Deny the allegations contained in Paragraphs 7 and 8 of the complaint, except that they admit the date of passage and content of § 46 of the Act of May 25, 1926 and allege that said § 46 does not have any application to privately owned lands within the Imperial Irrigation District and further allege that the aforesaid inapplicability of § 46 has at all times since passage of the Boulder Canyon Project Act been recognized by Congress and, down to December 31, 1964, by the Secretary of the Interior, all as will be shown later herein.

6. Answering Paragraph 9 of the complaint, admit the genuineness, due execution and content of the December 1, 1932 contract (Exhibit A to the complaint) between the United States and Imperial Irrigation District, executed pursuant to § 4(b) of the Boulder Canyon Project Act, and of the March 4, 1952 Amendment and Supplement thereto (Exhibit B to the complaint). In this connection, these landowner defendants respectfully invite the attention of the Court to the fact that said contract of December 1, 1932, provides, in Article 17 thereof:

> "As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. This contract is for permanent water services but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used; first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact in the construction, management and operation of Hoover Dam, Imperial Dam, All-American Canal, and other works and the storage, diversion, delivery and use of water for the generation of power, irrigation, and other purposes."

The attention of the Court is further invited to the fact that said contract also provides in said Article 17:

> "Nothing in this contract shall be construed to prevent the District from diverting water to the full capacity of the All-American Canal if and when water over and above the quantity apportioned to it hereunder is available, ..."

7. Admit the allegations contained in Paragraph 10 of the complaint.

8. Answering Paragraph 11 of the complaint, admit and allege that said contract, Exhibit A, does not "expressly" or at all set forth the land limitation provisions of the reclamation law and allege further in this connection that all reference to said land limitation provisions was intentionally omitted from said contract by the then Secretary of the Interior, the Honorable Ray Lyman Wilbur, as required by the Boulder Canyon Project Act and its mandate to him for the satisfaction of vested and of present perfected rights in pursuance of Article VIII of the above mentioned Colorado River Compact. Allege further that said contract as written and as amended and supplemented by said contract of March 4, 1952 (Exhibit B to the complaint) has at all times been and is now in full force and effect and binding upon the United States.

9. Answering Paragraph 12 of the complaint, these landowner defendants allege that the ruling of February 24, 1933, by the Secretary of the Interior stated, among other things:

> "Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160 acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas."

10. Admit the allegations contained in Paragraph 13 of the complaint.

11. Admit the allegations contained in Paragraph 14 of the complaint.

12. Answering Paragraph 15 of the complaint, admit that defendant Imperial Irrigation District denies, and allege that these landowner defendants and the members

of the class whom they represent also deny, that the land limitation provisions of reclamation law apply or ever have applied to said District or to any privately owned lands within the boundaries of said District or to the owners of such lands or the holders of vested and of present perfected rights to the waters of the Colorado River, to wit, these landowner defendants and the members of said class. Admit and allege that defendant District denies, and allege that these landowner defendants and the class whom they represent also deny, the authority of the Secretary to require said District, either as a condition to future use or enjoyment of water stored at Lake Mead or of Imperial Dam or the All-American Canal, or otherwise or at all, to withhold delivery of water so diverted or carried to owners of private lands within the Imperial Valley who have not executed recordable contracts for the sale of any irrigable land they own in excess of 160 acres. Allege that such limitation provisions of the reclamation law are not and have not been applicable to privately owned lands within the boundaries of the Imperial Irrigation District. Admit and allege that defendant District has refused to require these landowner defendants and the class they represent to execute recordable contracts for the sale of such so-called excess lands as a condition to water delivery. Admit and allege that a substantial portion of the owners who hold more than 160 acres of irrigable lands being supplied with irrigation water by defendant District, through their representatives, have advised the Department of the Interior that they refuse to execute recordable contracts for many reasons, including particularly the basic proposition that the land limitation laws do not now have and at no time have had any application to privately owned lands lying within the boundaries of the Imperial Irrigation District.

13. Answering Paragraph 16 of the complaint, admit and allege that there exists an immediate and substantial controversy between plaintiff and not only defendant District but also these landowner defendants and the class whom they represent as to (1) whether defendant is required to comply with the land limitation provisions of reclamation law in delivering Colorado River water stored,

diverted and transported via the All-American Canal to privately owned lands situated within the boundaries of the Imperial Irrigation District and as to the basic question (2) whether said land limitation provisions have any application to privately owned lands lying within the boundaries of said Imperial Irrigation District.

14. Deny the allegations of Paragraph 17 of the complaint, except admit and allege that resumption of control of the All-American Canal facilities and termination of water deliveries by or at the behest of plaintiff would cause wholesale hardship and economic disaster to all the landowners of the Imperial Valley, whatever the size of their holdings, and to all the citizens of the Imperial Valley.

For further answer to the complaint herein, these defendants allege:

II. CONTENTION RE VESTED AND PRESENT PERFECTED RIGHTS.

15. Due to the below-sea-level topography of the Imperial Valley area, it was recognized as early as the middle of the 19th century that irrigation by means of diversion and gravity flow from the Colorado River was feasible. However, it was not until the period of 1892-95 that appropriations for irrigation from the river were initiated. Commencing in 1901, Colorado River water, diverted for use in the Valley area, was channeled through the then newly constructed Alamo Canal, which ran for a portion of its course through Mexico and then back into the United States.

16. During the period 1895-1899 seventeen notices of appropriation under the then provisions of the California Civil Code were posted and recorded covering the diversion of water from the Colorado River for beneficial use within the Imperial Valley. Some of these notices were filed by or on behalf of California Development Co., and it acquired the rest by assignment, all as shown by Exhibit A hereunto annexed and made a part hereof. Each of these notices claimed 10,000 cubic feet flow per second of the waters of the river at a specified point of diversion. The amount

claimed in each of said notices, if present in continuous flow, would approximate 7,000,000 acre feet per year; and the notices each specified the area to be served as including at least 1,000,000 acres of land, including all of the lands now embraced within the Imperial Irrigation District. By 1903, as a result of the distributive facilities constructed by the California Development Co., approximately 12,000 acres of Valley lands were in irrigated cultivation, all as the result of diversions from the river.

17. In the years of 1905-1907 a disastrous flood occurred in the Valley and the Development Company's canal heading on the Colorado River was washed out due to an abnormally high river flow. The result of this breakthrough was that the entire flow of the river poured into the sub-sea-level valley, thus substantially raising the surface of Salton Sea, formerly nearly dry, to 195 feet below sea level and extending its area to approximately 330,000 acres. The break was finally closed in 1907 and the Colorado River returned to its course.

18. Subsequently, the interests of the California Development Co., including all of the appropriative rights then owned by it, passed to the Southern Pacific Railroad, and ultimately in 1916, to the Imperial Irrigation District, which had been organized in 1911. The diversions under the duly noticed appropriations continued, and the ultimate distribution of the Colorado River water, which was carried by the Alamo Canal via Mexico to the individual farm holdings, was handled by thirteen local mutual water companies. In 1922, these companies and their facilities were acquired by the District.

19. On October 23, 1918, a contract was executed between the Government and Imperial Irrigation District, providing for a connection with, and diversions by the District from, Laguna Dam on the Colorado River. Cf. 43 U.S.C. § 617i. This contract provided, without any acreage limitation of any kind, for the supplying of water to all of the lands within the Valley. Section 10 of the Boulder Canyon Project Act provides that nothing in the Act shall be construed as modifying said contract of October 23, 1918.

20. Conditions of natural growth and expansion in the Valley were reflected in augmented diversions in exercise of the various existing appropriative rights. While only 141,000 acres were being irrigated in the Valley in 1908, by 1920 over 415,000 acres were under irrigation.

21. All of the rights of diversion and transport as noted above, were ultimately acquired by the said Irrigation District, while the actual beneficial use has been made by the individual growers. As a result of this situation, the water rights have been divided: The District, as trustee for the landowners within its boundaries has rights of appropriation, development and transport; the individual landowner has vested and present perfected rights of beneficial use, enjoyment, and continued supply; and each is a successor in interest of the or an original appropriator and of the California Development Co.

22. On November 24, 1922, the Colorado River Compact was executed and ultimately ratified by the requisite number of contracting states, including California, and approved by Congress, cf. Boulder Canyon Project Act, infra, Section 13(a); and for text of the compact see House Doc. No. 605, 67th Cong., 4th Sess. Article VIII of said Colorado River Compact, to which the State of California was a party, provided and now provides in pertinent part that

> "Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this compact."

23. The concept of an All-American canal came into being in the early years of the present century. The 1905 break-through and flood emphasized the dangers of the Alamo Canal route through Mexico; and there were also present the aggravations resulting from difficulties with Mexican laws which impeded adequate levee and canal maintenance. Ultimately, the construction of the All-American Canal was authorized as part of the general project authorized by the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057, 43 U.S.C. § 617, et seq. At the time of the passage of the Project Act in 1928, the Irrigation District had a fully developed distributive system, comprising approximately 1700 miles of main and lateral canals and providing for the irrigation of substantially the same amount of acreage as is now being irrigated.

24. The contract between the Government and Imperial Irrigation District for the "construction of diversion dam, main canal and appurtenant structures and for delivery of water" in connection with the Boulder Dam Project and the All-American Canal, was executed December 1, 1932, and supplemented by a subsequent contract dated March 4, 1952, all as hereinabove mentioned. The canal was completed and first put into operation in 1942. After a brief "shakedown" period, the All-American Canal finally, in 1943, fully supplanted the Alamo Canal as a vehicle for the transmission of water from the river for beneficial use on the lands within the Imperial Irrigation District. The effect of the new canal was thus to substitute a new conduit for the transmission of the water from the diversionary works on the river to the already established network whereby the District continued to carry out its long existing function of distributing the water to those — the individual landowners — who had for years been putting it to beneficial use under continued supply by said District or its predecessors.

25. The Irrigation District, acting in light of Secretary Wilbur's assurance that the limitation laws are not applicable to privately held lands lying within the boundaries of said District, ceased using the Alamo Canal in 1942 and wrote it off at a loss of $15,000,000. In 1960, the District sold its concession rights in the Alamo Canal to the Cia Dei Torrenos y Ajuas de la Baja California, a Mexican corporation.

26. The District and its predecessors have at all times diligently constructed, developed, extended and maintained its distributive network and transport facilities in the exercise of the appropriative rights which it holds, with the result that it now diverts and distributes to its member landowners, for beneficial use upon their respective lands, water sufficient for the irrigation of substantially the same amount of acreage as was irrigated in 1929 through the use of the Alamo Canal. The District diversions from the

river have never exceeded the 10,000 second-feet specified in each of the original Notices of Appropriation earlier mentioned.

27. In enacting the Project Act in 1928, Congress was well aware that there was a fully developed system in the Imperial Valley for the distribution of Colorado River water as to which rights of appropriation and beneficial use had long since been vested and perfected. Accordingly Congress by the Boulder Canyon Project Act transmuted into positive law the guarantee of the satisfaction of vested and of present perfected rights contained in the Colorado River Compact and, in so doing, also transmuted into positive law the provision of the Compact that such rights should be satisfied, not from the natural flow of the River, as theretofore, but from water which should be stored behind the Hoover Dam facility.

28. Under Federal law, the rights guaranteed by the Boulder Canyon Project Act are rights acquired, perfected and vested under state law, which is therefore here controlling as to the nature and extent of such rights, all as contemplated by such Federal law.

29. All water presently diverted from the river and delivered by the All-American Canal for distribution through the Irrigation District's facilities to privately held lands, is delivered in satisfaction of vested and present perfected rights, as guaranteed by the Boulder Canyon Project Act, 43 U.S.C. § 617e, by the Colorado River Compact, and by the contract dated December 1, 1932, between the Government and Imperial Irrigation District. The rights in question were long since and are now developed, exercised and perfected by the Imperial Irrigation District and its predecessors and put to beneficial use by the landowners within its borders; and as such are vested and present perfected rights, all to the knowledge of the plaintiff and particularly its Secretary of and its Department of the Interior.

30. It is the mandatory duty of the Secretary of the Interior to contract for the satisfaction of and to satisfy such vested and present perfected rights appurtenant to

lands and ownerships of lands within the Imperial Valley or the Imperial Irrigation District, or both, without limitation as to the acreage held in such ownerships.

31. The aforesaid duty of the Secretary of the Interior to satisfy vested and present perfected rights of the landowners out of stored water is wholly incompatible with any attempt to impose land limitations upon such landowners; and the same is also true as to the attempt to import the land limitations into the Boulder Canyon Project Act which guarantees such vested and present perfected rights.

III. CONTENTION RE LEGISLATIVE HISTORY.

32. Paragraphs 15 to 27, inclusive, are incorporated herein by reference.

33. The legislative history of the Boulder Canyon Project Act shows that Congress (a) intended to and did preserve and protect the vested and present perfected water rights of the owners of private lands in the Imperial Valley and (b) did not intend to and did not impose a 160-acre limitation or any other land limitation on the delivery of Colorado River water by the All-American Canal to the privately owned lands of the Imperial Valley.

IV. CONTENTION RE ADMINISTRATIVE PRACTICE.

34. Paragraphs 15 to 26, inclusive, are incorporated herein by reference.

35. The ruling of Secretary Wilbur on February 24, 1933, referred to in Paragraph 9 hereof, to the effect that the land limitation laws are not applicable to the Imperial Valley was based on a long standing Interior Department policy relating to the recognition of vested rights (see Paragraphs 36 to 36.6, inclusive, hereof) and has been consistently followed since that time until Solicitor Barry's December 30, 1964 opinion (see Paragraphs 37 to 37.13, inclusive, hereof).

36. The provisions of the Project Act guaranteeing satisfaction of vested and of present perfected water rights without reference to acreage limitations were in full

harmony w h a policy of the Department of the Interior adopted at least as early as 1910. Among instances of such interpretations, particularly with reference to the recognition and satisfaction of vested water rights as opposed to acquiring them by exercise of the right of eminent domain, or, as is being attempted here, to confiscating them by compelling an *in terrorem* transfer of such rights to strangers at arbitrary prices arbitrarily set by the Secretary of the Interior, are the following, all of which are well known to plaintiff and to the said Secretary.

36.1 The first documentary recognition of the principle that where vested water rights were concerned, the Department of the Interior was obligated either to recognize such rights or pay for their acquisition by eminent domain or inverse condemnation was the opinion-memorandum of the Director of Geological Survey to the Secretary of the Interior, November 16, 1905, in connection with the Umatilla Project. Based upon said opinion-memorandum and upon the opinion of the Assistant Attorney General, 34 L.D. 351, in the same matter, the then Secretary decided he was obligated to respect and to satisfy such rights; and he did so.

36.2 On May 31, 1910, the Secretary promulgated a regulation to the effect that the provisions of § 5 of the Reclamation Act of 1902 limiting the area for which the use of water may be sold, does not prevent recognition of a vested right for a larger area and protection of the same "by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges." 38 L.D. 637, Par. 45.

36.3 In the Anna M. Wright case, in 1911, the 1910 regulation was applied by the Department in support of the claim of a widow, owning 160 acres in her own right, to succeed to the additional 160 acres held by her husband during his lifetime, the water rights appurtenant to each 160 acre parcel being vested. 40 L.D. 116. To the same effect as regards the application of the 1910 regulation to so-called excess lands are, to the present knowledge of these landowners defendants, the Newlands and the North

Platte projects, in addition to the Umatilla Project mentioned above.

36.4 The 1910 regulation was carried into a 1916 compilation of departmental regulations, 45 L.D. 385, 386, § 81, and the Federal Code of Regulations, Title 43, § 230.70, formerly § 230.80, so provides at the present time.

36.5 On October 23, 1918, then Secretary Lane executed the Laguna Dam contract with Imperial Irrigation District. That contract contained no acreage limitation clause and provided for the supplying of irrigation water, without limitation, for all lands within the District.

36.6 The foregoing administrative precedents were summarized by Secretary Wilbur in his ruling of February 24, 1933, as follows:

"In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Anna M. Wright, 40 L.D. 116). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others."

37. Consistent administrative interpretations of the Department of the Interior are wholly in accord with the proposition that the land limitation laws do not apply, and never have applied, to lands held in private ownership in the Valley. Among such interpretations are the following:

37.1 The contract of December 1, 1932 executed by the then Secretary and the District likewise, as we have seen,

not only contained no acreage limitation clause but expressly provided for the satisfaction of vested and of perfected rights pursuant to Article VIII of the Colorado River Compact. The provisions of the contract are and each of them is wholly incompatible with any concept of the applicability of the excess land limitations to lands within the Imperial Irrigation District.

37.2 A memorandum dated February 7, 1933 from Assistant Commissioner of Reclamation Porter W. Dent to Northcutt Ely, Esq., Executive Assistant to Secretary Wilbur, stated as follows with reference to the privately owned lands in the Imperial Valley:

> ". . . So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned . . . . "

37.3 Mr. Ely replied to Assistant Commissioner Dent in a letter dated February 16, 1933 saying, "I agree with the views expressed in your memorandum of February 7, regarding the case of *Charles Malan v. Imperial Irrigation District, et al.*"

37.4 Secretary Wilbur's February 24, 1933 ruling to the District, referred to and quoted in Paragraph 9 hereof, was written during the pendency of *Hewes v. All Persons,* being action No. 15460 on the files of the Superior Court for Imperial County, and with the intention that the Court, the District, and the landowners should rely upon its contents and its ruling as to the inapplicability of the acreage limitations to privately owned lands within the Valley; and the Court, the District, and the landowners generally did so rely.

37.5 In a letter dated March 1, 1933 and written during the pendency of the *Hewes* case by Assistant Commissioner Dent to Richard J. Coffey, Bureau District Counsel, Los Angeles, the Assistant Commissioner stated in substance as follows:

> (a) The same principle, i.e., in applicability of the excess land limitation to private lands in the Valley, applied as well to the provisions of § 46 of the Act of May 25, 1926, mentioned in Paragraph 7 of the complaint herein, as to the provisions of Section 5 of the Reclamation Act of 1902, mentioned by Secretary Wilbur in his letter-opinion of February 24, 1933.
>
> (b) The All-American Canal work constitutes a special project specifically authorized by the Boulder Canyon Project Act and thus stands upon a basis quite different from the ordinary concept of a project.
>
> (c) The acreage limitation in the reclamation law, including § 46 of the Act of May 25, 1926, does not apply to lands having a vested right.
>
> (d) The specific provisions of the Boulder Canyon Project Act are controlling over the general provisions of the reclamation law.
>
> (e) Section 46 is of general application and of course contemplates a case where a project is being constructed from which a new and complete water right will be sold and where a distribution system is constructed and water deliveries made through it.

37.6 In a 1937 study of excess land ownerships, Commissioner of Reclamation John C. Page addressed to all field offices a communication whose subject was "Irrigable land holdings in excess of 160 acres in single ownerships." This document stated, in pertinent part, that the 160-acre limitation "is not applicable in any case where a vested non-project water right for a larger area has been acquired and recognized."

37.7 B. P. King, an attorney in the employ of the Bureau of Reclamation, was authorized by Commissioner of Reclamation W. J. Burke to embark upon a comprehensive review of the excess land laws. The result was a publication in 1941 entitled "The Excess Land Provisions

of the Federal Reclamation Laws." Among other things, the said publication stated:

(a) Where the water rights belong to the owner of the land, a contract executed between the Government and the carrier of the water limiting the right of the owner of the land to enjoy the use of pre-existing water rights could have no validity insofar as the landowner is concerned unless his consent to the contract could be shown.

(b) If the Government, under contract with an irrigation district, constructs a new main canal to replace more or less unsatisfactory existing works, the enforcement of the excess land restrictions would appear to deprive the landowners holding more than 160 acres of property, i.e., the right to utilize a previously perfected water right free of such restrictions, without due process of law.

(c) Speaking of the December 1, 1932 contract between the Government and Imperial Irrigation District: "The contract does not, by any of its terms, stipulate that water shall be furnished only in accordance with the provisions of the Reclamation Laws . . . ." If Congress had intended to make the excess lands restrictions operative, it seems a reasonable assumption that some such language as follows would have been used:

"which said Reclamation law shall govern the construction, operation and maintenance of said works and the use of water therefrom."

(d) "The conclusion that the excess lands restrictions do not apply to the All-American Canal project is supported by the decision of the Superior Court of California for Imperial County in the proceedings confirming the contract with the Imperial Irrigation District. (Unreported opinion dated May 24, 1932 in the case of Evan T. Hewes, et al. v. All Persons.)"

(e) "Also, the fact that confirmation of the contract was made a condition to construction of the project

and the fact that the Government after confirmation of the contract, went ahead with construction indicates administrative acquiescence in the views expressed by the California Court."

37.8 On January 14, 1942, Commissioner of Reclamation John C. Page wrote a letter to Commissioner W. F. Rhea of the Farm Credit Administration (Land Bank Division) confirming earlier oral advices to representatives of the Federal Land Bank at Berkeley, California, that as regards the applicability of the 160-acre limitation to privately owned lands within the Imperial Irrigation District, "it is the opinion of the Bureau of Reclamation that the limitation does not apply to such lands." Said letter enclosed an extract from the opinion of the trial judge and copies of the Findings in the *Hewes* case covering the point under discussion.

37.9 In 1946, the Bureau of Reclamation published its "Landownership Survey on Federal Reclamation Projects." The publication sets forth various tabulations including a listing of "known excess land in violation of acreage limitations, project by project." For "Boulder Canyon Project: All-American, Imperial Valley" the excess acreage is shown as zero, accompanied by the footnoted explanation: "Excluded in accordance with the ruling of the Secretary, February 24, 1933."

37.10 In 1948, Secretary of the Interior Krug, responding by letter to an inquiry of the Veterans of Foreign Wars questioning the Department's policy of not imposing the acreage limitation to lands in the Imperial Valley, stated the reasons for that policy as follows:

". . . we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the

district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law." Letter from Secretary of Interior Krug to Mr. H. C. Hermann, Veterans of Foreign Wars, April 27, 1948.

37.11 On April 19, 1950 the Commissioner of the Bureau of Reclamation advised the Solicitor General in connection with the case of *United States v. Gerlach Live Stock Co.* ultimately reported at 339 U.S. 725, that the water rights of the Imperial Irrigation District discussed in the *California Land Development* case, 33 L.D. 391, were acquired by the District in 1916 and the rights required for the District were "fully covered" by the provisions of the Boulder Canyon Project Act and the contracts made by the District with the United States thereunder.

37.12 On March 4, 1952, a supplement and amendment to the December 1, 1932 All-American contract between the Government and the District (Exhibit B to the complaint herein) was executed by the then Secretary and the District. It contained nothing with regard to acreage limitations and it reaffirmed, subject only to its own effect, the 1932 contract which, as earlier noted, likewise contained no acreage limitations. Such reaffirmance continued in effect the 1932 covenants with reference to the controlling effect of the Colorado River Compact.

37.13 Again in 1958, in response to an inquiry from the Justice Department in connection with the case of *Arizona v. California*, the Department of the Interior reaffirmed its position that the economic reliance placed upon Secretary Wilbur's ruling by the residents of Imperial Valley precluded a reversal of the ruling. In a letter of February 5, 1958, to the Solicitor General, the Solicitor of the Interior Department, Elmer F. Bennett, stated in part:

"The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160 acre limitation to the lands of the Imperial Irrigation District.

"At the time of court confirmation of the Imperial water contract (*Hewes v. All Persons*, May 24, 1933, unreported, before the Superior Court for Imperial County, California), defendant Malan, the owner of 210 acres, attacked the validity of the contract on the ground that the 160 acre limitation would prevent water delivery to all of his land. The court found the contract valid in all respects . . . . The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engaged upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect."

38. The acts and conduct on the part of the various incumbent Secretaries of the Interior and the various incumbent Commissioners of Reclamation and as well the Department of the Interior and its personnel and the documents referred to in the preceding subparagraphs of Paragraphs 35 to 37.13, inclusive, hereof are not all inclusive but are subject to augmentation through use of the discovery procedures.

39. Each and all of the acts and conduct above alleged in Paragraphs 35 to 37.13, inclusive, hereof as regards the

incumbent Secretaries of the Interior, the incumbent Commissioners of Reclamation and as well the Department of the Interior and its various personnel were done and carried on, and each and all of the documents referred to in said subparagraphs were issued, in compliance with law and in the performance of, and within the scope of, lawful authority.

40. The acts and conduct and as well the documents referred to in Paragraphs 35 to 37.13, inclusive, hereof constituted a reasonable contemporaneous, and long standing interpretation on the part of the officials and the Department of the Government charged with the administration of the reclamation laws of the United States that the land limitation laws have no application to privately owned lands within the Imperial Irrigation District.

41. The acts and conduct and as well the documents referred to in Paragraphs 35 to 37.13, inclusive, hereof, constituted a continuing series of representations by the officials and the Department of the Government charged with the administration of said laws to the public and to the private landowners within the Imperial Valley that the acreage limitation laws do not have any application to privately owned lands within said Valley or said District, and the public and the landowners in said Valley have justifiably and in good faith relied to their detriment upon said representations, as is more fully alleged in Paragraphs 49 to 51 hereof, inclusive.

V. CONTENTION RE CONGRESSIONAL RATIFICATION.

42. Paragraphs 15 to 26, inclusive, and Paragraphs 35 to 41, inclusive, are incorporated herein by reference.

43. The administrative construction embodied in Secretary Wilbur's ruling of February 24, 1933 and in the other rulings and interpretations set forth in Paragraphs 35 to 39, inclusive, has been ratified and approved by Congress and the President through the enactment of appropriation measures and other legislative acts over a period of 34 years.

VI. CONTENTION RE RES ADJUDICATA.

44. Paragraphs 15 to 26, inclusive, are incorporated herein by reference.

45. 43 U.S.C. § 511 provides in pertinent part that no contract such as that referred to in Paragraph 24 hereof shall be binding upon the Government until the proceedings on the part of the District for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction. Article 31 of the December 1, 1932 Contract provided that the District prosecute to final judgment "proceedings in court for a judicial confirmation of the authorization and validity of this contract." Such a proceeding was duly filed, an action *in rem* entitled *"Hewes v. All Persons,"* etc., being action No. 15460 on the files of the Superior Court for Imperial County, California. The court in such proceeding upheld the authorization and validity of the contract and in its Finding No. 35 specifically found that the delivery of water should not be limited to 160 acres in single ownership. Finding 35 states as follows:

> "That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned." (*Hewes v. All Persons,* Findings of Fact and Conclusions of Law, p. 26)

In its Opinion the Court held: "There is nothing in the statute [Boulder Canyon Project Act] or in the contract limiting the acreage to which water may be sold and delivered." (p. 24) All of this, including the fact that said judgment was binding as an *in rem* judgment upon defendant District and upon all persons having an interest in the subject matter of said contract, was known to the plaintiff and to the Department of the Interior. Pursuant

to Article 31 of the contract, certified copies of the documentary proceedings in said action were furnished to the Department. The Department and the Government, with full knowledge of the holding and the findings, including Finding No. 35, in *Hewes v. All Persons,* acquiesced in the same for over 30 years, as did all persons and all parties, including the District, above mentioned. As a result, the judgment in the *Hewes* case is binding upon the United States and upon each and all of said persons and parties, all as contemplated by 43 U.S.C. § 511 above mentioned.

VII. CONTENTION RE CONTRACT

46. Paragraphs 15 to 25 and 45 are incorporated herein by reference.

47. The contract of December 1, 1932 between the United States and the Imperial Irrigation District, as written, is binding upon the United States, as contemplated by 43 U.S.C. § 511.

VIII. CONTENTION RE ESTOPPEL.

48. Paragraphs 15 to 26, inclusive, and Paragraphs 35 to 41, inclusive, are incorporated herein by reference.

49. The public and the private landowners within the Imperial Valley and the Imperial Irrigation District at all times from as early as 1905 down to December 31, 1964 have justifiably and in good faith relied upon the administrative construction embodied in Secretary Wilbur's ruling of February 24, 1933 and the other rulings set forth in Paragraphs 35 to 39, inclusive, to their detriment in that

(a) substantially every purchase of, and loan of money secured by lands and water rights appurtenant thereto during the period 1905-1964, both inclusive, was made in the belief that there were no applicable limitations or restrictions as to the number of acres of land which might be held in single ownership without impairment of water rights appurtenant to such land;

(b) substantially all improvements to lands purchased during the period 1905-1964 were made in the belief that the limitation provisions of the reclamation law are not

applicable to privately owned lands in the Valley; and the costs of such improvements, including the installation and maintenance of tile drainage therefrom and thereunder, has been substantial; and

(c) substantially all private investments during the period 1905-1964 in machinery and equipment for use on farms exceeding 160 acres were made in the belief that said limitations were inapplicable in the Valley.

50. The aforesaid justifiable reliance was induced, fostered, engendered and encouraged by the administrative construction embodied in Secretary Wilbur's ruling of February 24, 1933 and by the other administrative interpretations set forth in Paragraphs 35 to 37.13, inclusive.

Reliance upon the inapplicability of the provisions of the reclamation law to privately owned lands in the Imperial Valley has resulted in the development of the area, so far as size of operative ownerships is concerned, along economically efficient lines. The advent of modern machinery and the development of improved methods of farming technology have resulted in a natural expansion of farm sizes in the Valley which parallels that evidenced generally in those parts of the state and in the nation where natural conditions of economic growth are permitted to prevail. The value of agricultural products in the Valley, over all, increased from some $4 million in 1909 to approximately $200 million in 1965. The gross value of livestock and dairy products in the Valley in 1965 was approximately $64,400,000, and leading crop values were as follows:

Cotton Lint	$22,700,000
Hay, Alfalfa	22,300,000
Lettuce	20,100,000
Sugar Beets	19,700,000
Barley	11,400,000
Sorghum	10,800,000
Pasture	3,100,000
Cotton Seed	2,900,000
Carrots	2,900,000
Tomatoes	2,700,000

(Continued)

Cantaloupes	$2,400,000
Watermelons	2,100,000
Onions	2,000,000
Asparagus	1,500,000
Alfalfa Seed	1,400,000
Mixed Vegetables	1,100,000

51. Imposition of the limitation provisions of the reclamation law at this late date would drastically disrupt the entire economy of the Imperial Valley to the detriment of the private landowners who have justifiably relied on the aforesaid administrative construction and other rulings and interpretations, as well as to the detriment of every resident of the Imperial Valley whose livelihood depends on the agricultural economy which has been developed in the Valley in reliance on said administrative construction and other rulings and interpretations.

52. By reason of the foregoing facts and circumstances, the complaint herein is without equity.

53. By reason of the foregoing facts and circumstances, the plaintiff is estopped now to assert that the land limitation provisions of the reclamation law are applicable to privately owned lands within the Imperial Irrigation District.

IX. CONTENTION RE DUE PROCESS.

54. Paragraphs 15 to 26, 29 to 31, 35 to 37.13 and 49 to 53, all inclusive, are incorporated herein by reference.

55. The application of § 46 of the Act of May 25, 1926, to lands within said District owned and held by the class of landowners to which these landowner defendants belong would deprive said members of said class and each of them of their property, to wit, their respective rights to a continued supply of water from the Colorado River, for beneficial use upon their irrigable lands, and the whole thereof, without due process of law within the intendment of the Fifth Amendment to the Constitution of the United States. In the event of compliance with said § 46, the result would be a forced sale of both the land and of the

vested and the present perfected water right appurtenant thereto at a price fixed by a stranger, to wit, the Secretary of the Interior. In the event of refusal to execute a recordable contract consenting to such forced sale at a price so to be fixed, the result would be a deprivation of the water and of the vested and present perfected right to its beneficial use upon the land which deprivation would, in turn, render the land worthless.

56. The vested and present perfected rights of these landowner defendants and of the members of the class to which they belong to a continued supply of water from the Colorado River for beneficial use upon their respective irrigable lands, and the whole thereof, are valuable rights of property appurtenant to said lands. But for the duty of the United States to satisfy said rights, said defendants and said members and each and all thereof would, in the event of impairment or destruction by plaintiff of said rights, be entitled to just compensation for their taking within the intendment of the Fifth Amendment to the Constitution of the United States, the amount of such compensation to be determined and awarded in manner and form as provided by law.

WHEREFORE, these defendant landowners for and on behalf of themselves and the class which they represent, respectfully pray that this Honorable Court declare, hold, adjudge and decree as follows:

1. The defendant Imperial Irrigation District is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to any of the privately owned lands within the boundaries of Imperial Irrigation District;

2. The land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District;

3. These landowner defendants and each of them and the class which they represent and each of the members thereof and each and all their respective predecessors in interest have and for more than forty years last past have had vested rights in and to the continued and continuous

supply through the distribution facilities of defendant Imperial Irrigation District of the waters of the Colorado River theretofore dedicated to public use and to beneficial use upon their respective and privately owned lands irrespective of acreage held in single or other ownership;

4. These landowner defendants and each of them and the class which they represent and each of the members thereof and each and all their respective predecessors in interest have and since June 25, 1929 have had present perfected rights in and to said continued and continuous supply of said waters through the distribution facilities of the defendant Imperial Irrigation District, irrespective of acreage held in single or other ownership;

5. The irrigable land held in private ownership by these landowners defendants and by the members of the class which said defendants represent herein is held by them, respectively, free and clear of any claims of plaintiff that the land limitation provisions of reclamation law have any application to said lands or any thereof, or that said land limitation provisions are binding either upon defendant Imperial Irrigation District or upon said owners of said lands or any thereof, or that said provisions have any operation or limiting effect upon deliveries of Colorado River water to said lands or any thereof;

6. It is the duty of the United States to respect and to refrain from interfering, directly or indirectly, with the vested rights of these landowner defendants and the members of the class which said defendants represent herein to continued and continuous supply of the waters of the Colorado River.

7. It is the duty of the United States to satisfy present perfected rights in and to the waters of the Colorado River owned and held by these landowner defendants and each of them and by each and all of the members of the class which these landowner defendants represent and to refrain from interfering, directly or indirectly, with the enjoyment of such rights or the beneficial use of said waters upon the lands or any thereof owned or held by said defendants or by said members of said class.

LIST OF NOTICES OF APPROPRIATIONS AT HANLON HEADING MADE DURING PERIOD 1895-1899 AND ASSIGNMENTS TO THE CALIFORNIA DEVELOPMENT COMPANY

Item No.	Notice by	Notice Posted	Notice Recorded	Assignment to C. D. Co.	Assignment Recorded
B-114	E. I. Rockwell	May 16, 1895	May 18, 1895	Aug. 15, 1911	Aug. 19, 1911
B-116	W. T. Gonder	July 15, 1895	July 17, 1895	[1]Jan. 25, 1899	Feb. 1, 1899
B-117	W. T. Heffernan	Sep. 13, 1895	Sep. 16, 1895	[2]Jan. 18, 1899	Feb. 1, 1899
B-118	W. T. Gonder	Nov. 12, 1895	Nov. 14, 1895	Jan. 25, 1899	Feb. 1, 1899
B-120	W. T. Gonder	Jan. 14, 1896	Jan. 16, 1896	Jan. 25, 1899	Feb. 1, 1899
B-121	W. T. Heffernan	Mar. 16, 1896	Mar. 18, 1896	Jan. 18, 1899	Feb. 1, 1899
B-124	W. T. Heffernan	May 16, 1896	May 18, 1896	Jan. 18, 1899	Feb. 1, 1899
B-127	W. T. Heffernan	Oct. 20, 1896	Oct. 23, 1896	Jan. 18, 1899	Feb. 1, 1899
C-132	W. T. Heffernan	Jan. 23, 1897	Jan. 25, 1897	Jan. 18, 1899	Feb. 1, 1899
C-133	W. T. Gonder	Mar. 27, 1897	Mar. 29, 1897	Jan. 25, 1899	Feb. 1, 1899
C-136	W. T. Heffernan	July 24, 1897	July 26, 1897	Jan. 18, 1899	Feb. 1, 1899
C-138	W. T. Gonder	Apr. 25, 1898	Apr. 28, 1898	Jan. 25, 1899	Feb. 1, 1899
C-141	W. T. Gonder	Nov. 4, 1898	Nov. 7, 1898	Jan. 25, 1899	Feb. 1, 1899
C-142	California Development Company (by Heffernan)	Dec. 15, 1898	Dec. 19, 1898		
C-143	C. N. Perry, for himself and C. D. Co.	Dec. 21, 1898	Dec. 24, 1898 Re-recorded on Jan. 5, 1898	Dec. 21, 1898	Dec. 24, 1898 Re-recorded on Jan. 5, 1899
C-146	C. N. Perry, for himself and C. D. Co.	Feb. 20, 1899	Feb. 23, 1899	Feb. 20, 1899	Feb. 23, 1899
C-149	C. N. Perry, for himself and C. D. Co.	Apr. 25, 1899	May 2, 1899	Apr. 25, 1899	May 2, 1899

All of these notices stated that: The amount of the claim was for 10,000 cubic feet per second of the flow of the Colorado River; the intended point of diversion was in the S. W. ¼ of Sec. 25, T. 15 S., R. 21 E., S.B.B. & M. (except for an apparent error in Gonder filing of Mar. 27, 1897); the purpose was for developing power and irrigation of lands in San Diego County, Calif., and in Lower California, Mexico; and the canal would run through Lower California, Mexico, and thence into that portion of San Diego County, State of Calif., lying to the east of the San Jacinto Mts. and known as the New River Country.

[1]On January 25, 1899, Gonder assigned all his rights, title and interest to water covered by his filings made "from time to time," to California Development Company.

[2]On January 18, 1899, Heffernan assigned all his rights, title and interest to water covered by his filings made "from time to time," to California Development Company.

ASSIGNMENTS TO CALIFORNIA DEVELOPMENT COMPANY

Item No.	Assignment by	Date of Appropriation Assigned	Assignment Executed	Assignment Recorded
C-143	[1]C. N. Perry	Dec. 21, 1898	Dec. 21, 1898	Dec. 24, 1898 Re-recorded on Jan. 5, 1899
C-144	W. T. Heffernan	Filings made "from time to time"	Jan. 18, 1899	Feb. 1, 1899
C-145	W. T. Gonder	Filings made "from time to time"	Jan. 25, 1899	Feb. 1, 1899
C-146	[2]C. N. Perry	Feb. 20, 1899	Feb. 20, 1899	Feb. 23, 1899
C-149	[3]C. N. Perry	Apr. 25, 1899	Apr. 25, 1899	May 2, 1899
C-310	E. I. Rockwell	May 16, 1895	Aug. 15, 1911	Aug. 19, 1911

[1]Included in Notice of Appropriation by Perry dated Dec. 21, 1898.

[2]Included in Notice of Appropriation by Perry dated Feb. 20, 1899.

[3]Included in Notice of Appropriation by Perry dated Apr. 25, 1899.

EXHIBIT A

HORTON, KNOX, CARTER & RUTHERFORD
Attorneys at Law
895 Broadway
El Centro, California
Telephone: 352-2821

Attorneys for Defendant
Imperial Irrigation District

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant.*	CIVIL ACTION FILE NO. 67-7-K ANSWER OF IMPERIAL IRRIGATION DISTRICT

BY WAY OF ANSWER TO PLAINTIFF'S COMPLAINT, DEFENDANT, IMPERIAL IRRIGATION DISTRICT, ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I

IMPERIAL IRRIGATION DISTRICT is not a Corporation, as indicated in the title of this action, but instead is an irrigation district organized and existing since 1911 by virtue of the Laws of the State of California.

II

IMPERIAL IRRIGATION DISTRICT is located in the Imperial Valley in California, which Valley is referred to in the Act of December 21, 1928 (45 Stat. 1057) commonly known as the "Boulder Canyon Project Act".

III

Answering Paragraph 4 of the Complaint, alleges that Section 4(b) of the Boulder Canyon Project Act provides in part that the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of the main canal and appurtenant structures in the manner provided in the Reclamation Law. Alleges that the Contract dated December 1, 1932, between the UNITED STATES and IMPERIAL IRRIGATION DISTRICT, annexed to Plaintiff's Complaint as "EXHIBIT A", made provision for such revenues. Denies Paragraph 4 of Plaintiff's Complaint to the extent it is inconsistent with this Paragraph of Defendant's Answer.

IV

Answering Paragraph 5 of Plaintiff's Complaint, alleges that the Secretary's authorization to prescribe general regulations with respect to contracts for the storage of water in Hoover Dam and for the delivery thereof is subject to the following express limitations: (References are to Sections of the Boulder Canyon Project Act).

(a) No charge shall be made for water or for the use, storage or delivery of water for irrigation or water for potable purposes in the Imperial Valley (Section 1).

(b) Contracts respecting water for irrigation and domestic uses shall be for permanent service . . . (Section 5).

(c) The Dam and reservoir shall be used, among other things, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact (Section 6).

(d) The UNITED STATES, its permittees, licensees and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals and other works herein authorized, shall observe and be subject to and controlled by the Colorado River Compact in the construction, management and operation of said reservoir, canals and other works, and the storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses and contracts shall so provide (Section 8).

(e) Nothing herein shall be construed as interfering with such rights as the States now have, either to the waters within their borders, or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement (Section 18). (The rights of IMPERIAL IRRIGATION DISTRICT are present perfected rights, vested and existing at the time the Boulder Canyon Project Act was passed.)

Denies Paragraph 5 of Plaintiff's Complaint to the extent it is inconsistent with this Paragraph of Defendant's Answer.

V

Answering Paragraph 6 of Plaintiff's Complaint, Section 14 of the Boulder Canyon Project Act provides "this Act shall be deemed a supplement to the Reclamation Law, which said Reclamation Law shall govern the construction, operation and management of the works herein authorized, except as otherwise herein provided". Alleges that the Act does otherwise therein provide with respect to the land limitation provisions of the Reclamation Law. Alleges further, that the Reclamation Law governs only the construction, operation and management of the works authorized by the Boulder Canyon Project Act and not the delivery of water to this answering Defendant, or the use thereof for irrigation.

VI

Answering Paragraphs 7 and 8 of Plaintiff's Complaint, denies that IMPERIAL IRRIGATION DISTRICT is or was at any time a reclamation project or a division of a reclamation project or a new reclamation project as those

terms are used in Section 46 of the Act of May 25, 1926 (44 Stat. 649). Alleges that the sole and only purpose of Sections 40 through 50 of the Act of May 25, 1926 "is the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis and the Secretary of the Interior is directed to administer said Sections to those ends." Said purpose is not and has never been applicable to IMPERIAL IRRIGATION DISTRICT and the privately owned lands located within said District. Alleges further that no "recordable contract" has ever been prepared or offered for execution by the Secretary of the Interior.

VII

Answering Paragraph 10 of Plaintiff's Complaint, alleges that the United States constructed Imperial Dam and the All American Canal pursuant to "EXHIBIT A", only after the authorization and validity of "EXHIBIT A" was judicially confirmed. Article 31 of "EXHIBIT A" in conformity with 42 Stat. 541, 43 U.S.C. 511, provides in part that "the United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision or pending appellate action if ground for appeal be laid." Final decision and a confirmatory final judgment was entered by the Superior Court of the State of California, in and for the County of Imperial in Civil Action No. 15460 entitled "HEWES vs. All Parties, Etc.,". Said final judgment provides in part as follows: "That under said contract between the UNITED STATES and IMPERIAL IRRIGATION DISTRICT, dated the 1st day of December, 1932, the delivery of water will not be limited to one hundred sixty (160) acres in a single ownership and that the lands of the Defendant, CHARLES MALAN, in excess of one hundred sixty (160) acres, will not be denied water because of the size of said ownership and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract so far as the size of individual ownership is concerned."

Said confirmatory judgment, including the portion quoted is binding on this answering Defendant and all parties and persons whatsoever. Alleges that said contract, "EXHIBIT A" as written, and as well said confirmatory judgment are, and each of them is, binding upon the UNITED STATES.

VIII

Answering Paragraph 11 of Plaintiff's Complaint, admits that the contract "EXHIBIT A", does not expressly set forth any land limitation provisions of Reclamation Law and alleges that said contract does not, by implication, reference or otherwise, include any of the land limitation provisions of the Reclamation Law. Alleges that the right of the Secretary of the Interior to prescribe and enforce rules and regulations under Article 24 of said contract is subject to other provisions of said contract and is further limited by those portions of the Boulder Canyon Project Act specified in Paragraph IV of this Answer. Alleges further that the Secretary's right to prescribe rules and regulations under Article 24 of "EXHIBIT A" may only be exercised after notice to Defendant and opportunity for it to be heard.

IX

Answering Paragraph 12 of Plaintiff's Complaint, alleges that the letter of Secretary RAY LYMAN WILBUR, dated February 24, 1933, was an administrative determination that the land limitation provisions of the Reclamation Law did not apply to privately owned land in Imperial Valley, California, and alleges that the same administrative construction has been consistently followed, both before and after the date of said letter.

X

Answering Paragraph 13 of Plaintiff's Complaint, alleges that Memorandum Opinion No. M-36675, dated December 30, 1964, by the Solicitor, Department of the Interior, is erroneous, incomplete and has no legal effect whatsoever.

Alleges that the public announcement of the Secretary on December 31, 1964, concerning certain instructions to Commissioner DOMINY, is not a rule or regulation nor a proper administrative interpretation or construction, has no legal effect whatsoever and exceeds the authority of the Secretary of the Interior. Alleges that there are no land limitation provisions applicable to this answering Defendant and that this action in any event, is premature.

XI

Answering Paragraph 15 of Plaintiff's Complaint, alleges that this answering Defendant is conclusively bound both by the confirmatory final judgment previously referred to in Paragraph VII of this Answer, and by the contract "EXHIBIT A" hereinabove referred to.

XII

Answering Paragraph 16 of Plaintiff's Complaint, alleges that the controversy referred to therein has been finally adjudicated by the confirmatory final judgment referred to in Paragraph VII of this Answer, and that said judgment is conclusive on the Plaintiff herein.

XIII

Answering Paragraph 17 of Plaintiff's Complaint, alleges that Plaintiff has no authority to resume control of the facilities of the All American Canal now being operated by this Defendant, nor to withhold delivery of water to this Defendant.

XIV

Alleges that the legislative history of the Boulder Canyon Project Act shows that the Congress of the United States did not impose any land limitation provisions of Reclamation Law on privately owned lands in the Imperial Valley, and further, that the Congress did not intend to impose such land limitation provisions on said lands. Alleges that Congress and the Secretary of the Interior and the Plaintiff

herein have at all times had actual and constructive knowledge of the confirmatory final judgment referred to in Paragraph VII of this Answer and that the Congress has, from time to time, by the passage of laws and appropriations, ratified and confirmed the judicial construction of "EXHIBIT A" as contained in the confirmatory final judgment, and alleges further, that Congress has adopted the judicial construction of the confirmatory final judgment to the effect that land limitation provisions of the Reclamation Law do not apply to privately owned lands within Imperial Valley.

XV

Alleges that at all times since the entry of the confirmatory final judgment, Plaintiff has had knowledge of the provisions thereof, specifically the non-applicability of the land limitation provisions of Reclamation Law to privately owned lands in Imperial Valley and, nevertheless, Plaintiff has considered itself bound under the terms and conditions of the contract, "EXHIBIT A", and has accepted and continues to accept and retain the benefits from said contract, which benefits include, among other things, the following:

1. All public lands of the United States lying within the All American Canal service area have been included within the boundaries of IMPERIAL IRRIGATION DISTRICT.

2. Since 1933, thousands of acres of public lands within the boundaries of IMPERIAL IRRIGATION DISTRICT as now existing, have been patented by the Plaintiff to various private individuals, and have thus passed into private ownership, and most, if not all of said lands, have received and continue to receive water from Defendant's distribution system.

3. The payment by this Defendant of all sums provided to be paid by it to Plaintiff in and by the provisions of Articles 10 and 12 of said contract, "EXHIBIT A".

4. The performance by this Defendant of each and all of the provisions in said contract "EXHIBIT A" on its part to be performed.

By reason of the foregoing, Plaintiff is estopped and precluded now to assert that the land limitation provisions of the Reclamation Law are applicable to privately owned lands in IMPERIAL IRRIGATION DISTRICT. Alleges that Plaintiff's Complaint is wholly without equity.

XVI

This Defendant hereby adopts, and incorporates herein as its own, each and all of the contentions made in and by the answer of landowner defendants, intervenors herein. For purposes of brevity and to avoid repetition, said contentions so adopted are not set forth at length herein other than by this express reference to said Answer for further particulars as to the nature, extent and content of said contentions so adopted and incorporated, and each of them.

. WHEREFORE, Defendant prays that the Court hold, adjudge and decree that the land limitation provisions of Reclamation Law are not applicable to privately owned lands within the boundaries of IMPERIAL IRRIGATION DISTRICT, and for such other and further relief consistent therewith as the Court may deem proper.

DATED: May 26, 1967

HORTON, KNOX, CARTER
& RUTHERFORD

By .....
R. L. Knox, Jr.
Attorneys for Defendant
Imperial Irrigation District

[Declaration of Service Omitted]

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State of California

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant.* JOHN M. BRYANT, et al., Intervening defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervening defendant.*	No. 67-7-K Civil ANSWER OF DEFENDANT STATE OF CALIFORNIA

Defendant STATE OF CALIFORNIA (hereinafter "STATE"), appearing for itself and as *parens patriae,* for answer to the Complaint on file herein, alleges as follows:

I. INTERESTS OF STATE

1. At the request of the Governor of the State of California, STATE becomes a defendant herein by and through the Attorney General of California. The Governor is the

chief executive of the State (see *Cal. Const.* art. V, § 1). The Attorney General is the chief law officer of the State and head of its Department of Justice (*Cal. Const.* art. V. § 13; *Gov. Code* §§ 12510, 12512, 15000 & 15001).

2. STATE owns 7,843 acres of land, constituting the Imperial Waterfowl Management Area of its Department of Fish and Game, within defendant IMPERIAL IRRIGATION DISTRICT (hereinafter "IID"). That area is more particularly described in Exhibit A hereto. Water is delivered by IID from the All-American Canal to said department to irrigate and to pond irrigable lands of STATE in excess of 160 acres. That area could not be effectively utilized by STATE for protection of migratory waterfowl if STATE were limited to 160 acres of land.

3. STATE, *parents patriae,* has certain rights in waters of the main Colorado River, including present perfected rights. See *Arizona* v. *California,* 373 U.S. 546 (1963) [opinion], 376 U.S. 340 (1964), 383 U.S. 268 (1966) [decree]. These interstate water rights of STATE, *parens patriae,* include the rights of IID to main Colorado River waters, which are involved in the defenses to this action.

II. RESPONSES TO ALLEGATIONS OF COMPLAINT

4. Answering paragraph II of the Complaint: STATE alleges that the contract, Exhibit A to the Complaint, neither expressly nor impliedly includes or authorizes imposition of any of the land limitation provisions of the federal reclamation law to privately owned lands or to State lands within IID.

5. Answering paragraph 13 of the Complaint: STATE denies that Memorandum Opinion No. M-36675 dated December 30, 1964, by the Solicitor, Department of the Interior, correctly states the law as to the applicability of the federal land limitation provisions within IID. That law is correctly stated herein under heading III, which follows.

III. AFFIRMATIVE CONTENTIONS OF STATE

6. None of the land limitation provisions of the federal reclamation laws apply to privately owned lands or to State lands within IID.

7. Federal land limitation laws do not apply to privately owned lands within IID because of (a) the provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (1928), and other relevant statutes, according protection to vested water rights, including "present perfected rights"; (b) the legislative history of the Boulder Canyon Project Act; (c) the consistent administrative and practical construction, including particularly the 1933 opinion of Secretary of the Interior Ray Lyman Wilbur (Complaint, par. 12), relying in part upon the recognition and protection of "vested water rights" and the reliance thereon by landowners in purchasing, selling, and retaining lands within IID; (d) congressional ratification of the Wilbur opinion; (e) *res adjudicata;* and (f) estoppel.

8. Even if the federal land limitation laws were held applicable to "privately owned lands" within IID, those laws would not apply to lands owned by STATE, including its Imperial Waterfowl Management Area, because these lands are not "privately owned lands" within the meaning of the federal land limitation laws. This conclusion is compelled by the language of those laws, the legislative history, and the administrative, practical, and congressional construction and is consistent with the purposes of such laws.

WHEREFORE, STATE prays that the Court hold, adjudge, and decree:

1. That IID is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to privately owned lands or to State lands within the boundaries of IID.

2. That owners of lands within IID, including STATE and the class represented by the landowner defendants, are not bound by the land limitation provisions of reclamation law with regard to the execution of recordable contracts

or the use of Colorado River water on their lands within the boundaries of IID.

3. That if any land limitation provisions are applicable to other landowners within IID, such provisions have no application to lands owned by STATE, including its Imperial Waterfowl Management Area.

DATED: May 16, 1967

THOMAS C. LYNCH,
Attorney General of the State
of California
BURTON J. GINDLER,
DAVID B. STANTON,
Deputy Attorneys General

By .....
BURTON J. GINDLER
Deputy Attorney General

EXHIBIT A

Imperial Waterfowl Management Area
of
Department of Fish & Game, State of California
(Imperial Unit — Imperial Irrigation District)
7,843 acres

WISTER UNIT — 5243 acres
— Acquired: 1954-1958 by condemnation
— Location: Southeast corner of Salton Sea, west and northwest of Niland
— Uses by State Dep't of Fish & Game
• 3010 acres of cereal and marsh plants irrigated
• 740 acres ponded (300 acres of additional ponds for warm water hatchery, planned)
— Uses by U.S. Bureau of Sport Fisheries & Wildlife
• 160 acres of barley irrigated

HAZARD FLEET UNIT — 535.23 acres
— Acquired: 1948 by deed from certain parties (purchase)
— Location: Astride Alamo River about a mile south of Salton Sea
— Uses by State Dep't of Fish & Game
• 200 acres of barley to be irrigated
• 65 acres to be ponded
— Uses by U.S. Bureau of Sport Fisheries & Wildlife
• 80 acres of barley irrigated

FINNEY-RAMER UNIT — 2064.43 acres
— Acquired: 1931-1932 by land exchanges with certain parties
— Location: Astride Alamo River about 8-10 miles south of Salton Sea
— Uses by State Dep't of Fish & Game
• 200 acre water surface on Finney Lake (fed by drainage water)
• 235 acre water surface on Upper and Lower Ramer Lakes (fed by drainage water)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, vs. IMPERIAL IRRIGATION DISTRICT, a Corporation, *Defendant*. JOHN M. BRYANT, ROBERT C. BROWN, THEODORE B. SHANK, HAROLD A. BROCKMAN, CLARA MARIE GUTIERREZ, CHARLES E. NILSON, KAKOO D. SINGH, STEPHEN H. ELMORE and JOHN KUBLER, JR., Landowner Defendants, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the Imperial Valley in California. STATE OF CALIFORNIA, *Intervening Defendants*	NO. 67-7-T CIVIL JUDGMENT

This action came on for trial before the Court, Honorable HOWARD B. TURRENTINE, District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered by the Memorandum Opinion filed herein containing the Court's findings of fact and conclusions of law;

IT IS ORDERED, ADJUDGED AND DECREED:

1. The Defendant IMPERIAL IRRIGATION DISTRICT is not bound by the land limitation provisions of Reclamation Law in the delivery of Colorado River Water to any of the privately owned lands within the boundaries of IMPERIAL IRRIGATION DISTRICT.

2. The land limitation provisions of Reclamation Law have no application to privately owned lands lying within the IMPERIAL IRRIGATION DISTRICT; and accordingly the owners of such lands are in no case required, as a condition to receiving water, to execute recordable contracts pursuant to the provisions of Section 46 of the Omnibus Adjustment Act of May 26, 1926, 44 Stat. 649, 43 U.S.C. Section 422e, as amended.

3. The land limitation provisions of Reclamation Law have no application to lands owned by the State of California in its Imperial Water Fowl Management Area.

DATED: February 9, 1971

HOWARD B. TURRENTINE
Howard B. Turrentine
United States District Judge

APPROVED AS TO FORM
pursuant to Rule 7

DAVID R. WARREN
Attorneys for Plaintiff
United States of America

ARTHUR BRUNWASSER
445 Sutter Street, Suite 501
San Francisco, California 94108
Telephone: (415) 391-2203

Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IMPERIAL IRRIGATION DISTRICT,
a corporation,
Defendants,

JOHN M. BRYANT, et al.,

Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District.

STATE OF CALIFORNIA,
Intervenor.

Civil No. 67-7-T

BEN YELLEN, HARRY A. HEATH, FRANCES HEATH, RUFINA T. LIRA, WILLIE BRONSON, H. C. PHILLIPS, JUAN ALONSO LIRA, MANUEL VALDIVA, GENARO CUEN, APOLINAR GLORIA, L. M. MENOR, ALEJO CORTEZ, HENRY MARQUEZ, MARIA MARQUEZ, ESTELA OTERO, JUAN SENTEJAS, ALLI SLALI, JOSE DEL REL, JOSE CODNEZ, ALEX RODRIGUEZ, ALEX VILLEGAS, SR.,

NOTION OF MOTION:

1. To Intervene;
2. For Leave to Take Deposition;
3. For Stay of Implementation of Judgment Pending Ruling on Motion to Intervene

JOHN MCBAILEY, VICTOR CASTELLO, CRESCENCIO RUBIO, ROBERT MAJEYO, JOE PARRA, WILMA SELLERS, MARIE EATON, JOHN H. SMITH, ALBERT L. COUCH, FRANK EPPINGER, MARGARITA CARRELO, TROY W. SPARKS, ANDY SCHROCK, SAM L. GAFFORD, GEORGE H. GREEN, MATILDA FIERRO, MARIA HUEVAZ, EUGENE NELSON, BALDOMERO SAIZA, BENJAMIN R. LUNA, JR., JENNIE SAIZA, FELIZIA ESCALERA, ANITA LOPEZ, MRS. GLEN POWELL, GLEN POWELL, JOSEFINA PENUNURI, EUGENIO PONCE, RUTH VALDIVIA, JUANA PADILLA, ZOILA VIOLORIA, JOAQUIN PADILLA, JUANA ORTEGA, BELLE GREEN, RUTH HERNANDEZ ROMERO, MARY ARAUJO, DOLORES MARTINEZ, MIKE W. KELLEY, CARL MCLEMORE, JOSE M. ROSALES, ISABEL SOTO, CHARLES A. JENNINGS, BARNEY A. DEAN, PAT A. DEAN, CECIL LEE KELLEY, MARY GUERRERO, JOE RAGSDALE, PABLO DIAZ, JUNE CHAMBLESS, CHARLES E. PEREZ, SALOME S. PEREZ, CARL R. GRIMSLEY, JUNIOR ROBINSON, RICHARD CHEATWOOD, MRS. CRUZ LIMON, BENITO BUSTAMANTE, MANUEL ARAUJA, FERNANDO T. BARTIDO, ALBERT ARMSTRONG, LAURA JONES, MIKE MIRANDA, MARGUERITE JOHNSON, MARGARITA P. MORALES, EVA TORRES, MARY VILLEGAS, MACARIO F. PACHECO, EVELYN A. LLOYD, ANNIE L. CAMPBELL, GRACE DURAN, PACUNDO MADUENO, GUADELUPE MADUENO, MARY LEON, TERESA ARIAS, CLAUDINA COCOVA, DELFINA GUEBARA, LUISA RAMIREZ,

FAUSTINA ROSALEZ, PETRA MEDINA, CONCEPCION SETTLE, ISABEL TENIENTE, FRANK O. B. ADAMS, PALMIDA PEREZ, NELLIE RODRIGUEZ, MARY CURIEL, JOHNNIE TOWNSEND, TILLIE RODRIGUEZ, JORGE MORENO, WILLIAM GORHAM, H. K. HUTCHINSON, BERTHA J. HUTCHINSON, OBDULIA DAVILA, LUPE CASTANEDA, ADELAIDO R. PASQUEZ, JR., ERNESTINA VASQUEZ, MARTHA P. TABAREZ, FLORINE JONES, HENRY CLAY PICKLES, VIOLA GRIMSLEY, IDA K. PADDOCK, PEDRO ESCALERA, OLIVIA MARQUEZ, CECILIA SANDOVAL, YGNACIO SALAZAR,

Applicants for Intervention.

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 29, 1971, at the hour of 10:00 A.M., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Howard B. Turrentine, United States District Judge, U. S. Customs and Courthouse, San Diego, California, the above-named Applicants will move the Court for the following orders:

1. Permitting them to intervene as plaintiffs for the purpose of prosecuting an appeal from the Judgment of this Court entered February 9, 1971;

2. Granting leave to take the deposition of David Warner, Esq., Chief of Litigation of the Department of Justice, Lands and Natural Resources Division, Washington D.C.;

3. Staying implementation of the Judgment entered February 9, 1971, until a period of ten days following the Court's ruling on this motion.

Said motion will be made on the grounds that Applicants, and each of them, are persons within the class of beneficiaries of the Reclamation Act and that each Applicant: Claims an interest in the property and/or transaction which is the subject of this action; is so situated that the disposition of this action by this Court on February 9, 1971, may, as a practical matter, impair or impede his ability to protect that interest; and Applicants are not being adequately represented by the existing parties to this action.

Said motion will be based upon this Notice, such affidavits and other oral and documentary evidence as may be presented prior to and at the hearing of said motion, and the papers, pleadings and files herein.

DATED: March 12, 1971.

ARTHUR BRUNWASSER
Attorney for Applicants for Intervention

[Certificate of Mailing Omitted]

ARTHUR BRUNWASSER
445 Sutter Street, Suite 501
San Francisco, California 94108
Telephone: (415) 391-2203

Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor,*	AFFIDAVIT OF BEN YELLEN IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

BEN YELLEN, being duly sworn, deposes and says:

1. I am one of the petitioners for intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this court, entitled, "Ben Yellen,

et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants". The latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. Section 431 against absentee landowners.

2. My address is 128 South 8th Street, Brawley, California.

3. My occupation is physician.

4. For more than the past five years, I have been personally acquainted with all of the other petitioners who are now seeking to intervene in this proceeding. Most of said petitioners are agricultural workers who have been so employed within the Imperial Valley and in particular within the geographical boundaries of the Imperial Irrigation District. None of the petitioners, including myself, own farm land anywhere in the United States, and all of us wish to own land and to engage in farming on that land.

5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior.

6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately $25.00 to $50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between $1200.00 to $1400.00 per acre.

7. As a practical matter, the applicants are unable to purchase irrigated lands unless the Government appeals the judgment of this Court and ultimately prevails, so that the

excess lands will be sold under reasonable terms and conditions set by the Secretary of the Interior.

BEN YELLEN

Subscribed and sworn to before me
on March 14, 1971.

JEAN H. SCHMITT
Notary Public

[Notarial Seal and Certificate of Mailing
Omitted In Printing]

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for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IMPERIAL IRRIGATION DISTRICT,
a corporation,
Defendants.

JOHN M. BRYANT, et al.,
Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District,

STATE OF CALIFORNIA,
Intervenor,

BEN YELLEN, et al.,
Applicants for Intervention.

Civil No. 67-7-T

AFFIDAVIT OF CARL R. GRIMSLEY IN SUPPORT OF MOTION TO INTERVENE

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

CARL R. GRIMSLEY, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 655 North Imperial Av., Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

CARL R. GRIMSLEY
Carl R. Grimsley

Subscribed and sworn to before me
on March 26th, 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
Omitted In Printing]

ARTHUR BRUNWASSER
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

IMPERIAL IRRIGATION DISTRICT,
a corporation,
Defendants.

JOHN M. BRYANT, et al.,
Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District,

STATE OF CALIFORNIA,
Intervenor.

BEN YELLEN, et al.,
Applicants for Intervention.

Civil No. 67-7-T

AFFIDAVIT OF ADELAIDO R. VASQUEZ, JR. IN SUPPORT OF MOTION TO INTERVENE

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

ADELAIDO R. VASQUEZ, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 925 Ivy Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

ADELAIDO R. VASQUEZ
Adelaido R. Vasquez

Subscribed and sworn to before me
on March 20th 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
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ARTHUR BRUNWASSER
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF JORGE MORENO IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

JORGE MORENO, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 1379 C Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

JORGE MORENO
Jorge Moreno

Subscribed and sworn to before me
on March 26th, 1971.

MARY T. MORALES
Notary Public

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Omitted In Printing]

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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF ALBERT ARMSTRONG IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

ALBERT ARMSTRONG, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 686 South 13th Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

ALBERT ARMSTRONG
Albert Armstrong

Subscribed and sworn to before me
on March 21st 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF MACARIO F. PACHECO IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

MACARIO F. PACHECO, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al.. Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 1120 G Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

MACARIO F. PACHECO
Macario F. Pacheco

Subscribed and sworn to before me
on March 21st 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
Omitted In Printing]

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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF YGNACIO SALAZAR IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

YGNACIO SALAZAR, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No.

69-124 now pending in this Court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 956 G Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

YGNACIO SALAZAR
Ygnacio Salazar

Subscribed and sworn to before me
on March 20th, 1971.

MARY T. MORALES
Notary Public

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ARTHUR BRUNWASSER
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF PABLO DIAZ IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

PABLO DIAZ, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, "Ben Yellen,

et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 427 North 13th Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

PABLO DIAZ
Pablo Diaz

Subscribed and sworn to before me
on March 15th 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF EUGENIO PONCE IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

EUGENIO PONCE, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, "Ben Yellen,

et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 943 H Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

EUGENIO PONCE
Eugenio Ponce

Subscribed and sworn to before me
on March 20th, 1971.

MARY T. MORALES
Notary Public

[Notarial Seal and Certificate of Mailing
Omitted In Printing]

ARTHUR BRUNWASSER
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF ALEJO CORTEZ IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

ALEJO CORTEZ, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, "Ben Yellen,

et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 1132 B Street, Brawley, California.

3. My occupation is agricultural worker.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

ALEJO CORTEZ
Alejo Cortez

Subscribed and sworn to before me
on March 20th, 1971.

MARY T. MORALES
Notary

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Omitted In Printing]

ARTHUR BRUNWASSER
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San Francisco, California 94108
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Attorney for Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.* JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.* BEN YELLEN, et al., *Applicants for Intervention.*	Civil No. 67-7-T AFFIDAVIT OF MIKE MIRANDA IN SUPPORT OF MOTION TO INTERVENE

STATE OF CALIFORNIA }
COUNTY OF IMPERIAL } ss.

MIKE MIRANDA, being duly sworn, deposes and says:

1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, "Ben Yellen,

et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants"; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.

2. My address is 919 E Street, Brawley, California.

3. My occupation for many years is agricultural worker and farm labor contractor.

4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District.

MIKE MIRANDA
Mike Miranda

Subscribed and sworn to before me
on March 15, 1971.

HUGH S. RITTER
Notary Public

[Notarial Seal and Certificate of Mailing
Omitted In Printing]

ARTHUR BRUNWASSER
445 Sutter Street, Suite 501
San Francisco, California 94108
Telephone: (415) 391-2203

Attorney for Applicants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendants.*	Civil No. 67-7-T
JOHN M. BRYANT, et al., Intervenors, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District, STATE OF CALIFORNIA, *Intervenor.*	AFFIDAVIT OF FRANK J. BARRY IN SUPPORT OF MOTION TO INTERVENE
BEN YELLEN, et al., *Applicants for Intervention.*	

STATE OF OREGON
COUNTY OF LANE } ss.

Frank J. Barry, being first duly sworn, deposes and says:

That I reside at 2085 University Street, Eugene, Oregon; that I am a Professor of Law employed by the University of Oregon; that I teach Property, Environmental Law and Natural Resources Law;

That I served as Solicitor of the Department of the Interior from January 30, 1961, to April 7, 1968; that the Solicitor is the chief legal officer of the Department of the Interior; that a major part of the business of the Solicitor during the years that I held that office was the study, interpretation and application of the excess land provisions of the Reclamation Laws of the United States;

That I have read the opinion of the Honorable Howard B. Turrentine, Judge of the United States District Court for the Southern District of California in the case entitled, "*United States of America* v. *Imperial Irrigation District, et al.*" (No. 67-7-T of the files of said Court); that I have noted Judge Turrentine has held that said excess land laws do not apply to the Imperial Irrigation District; that this opinion is the opposite to the one I reached in my opinion of December 31, 1964;

That my said opinion was arrived at after careful study by the most experienced reclamation lawyers in the Department of the Interior; that it was concurred in by the Attorney General of the United States; that it was shared by the Solicitor of the Department of the Interior, Honorable Fowler Harper, in the Truman Administration (71 Int. Dec. 496, at 531-548) and by the Solicitor General in the Eisenhower Administration (71 Int. Dec. 496, at 555); that the circumstances of the issuance of the informal opinion of Secretary Wilbur "granting" the exemption, the fact that we were unable to find any evidence in the Department that Secretary Wilbur's Solicitor considered the informal opinion and the fact that none of those who recognized the exemption ever pretended to rely on more than that it was based on Secretary Wilbur's informal opinion, all raise doubts as to the correctness of the informal opinion;

That notwithstanding the conviction of the lawyers in my office, and of myself, and the lawyers in the Department of Justice, of the applicability of the excess land laws to the Imperial Irrigation District, we expressed a willingness to the representatives of the District and of the large landowners in the District to submit the entire issue for a judicial determination before taking steps to enforce what

we thought and think to be the law; that this was the subject of the negotiations referred to by Judge Turrentine on p. 4 of his Memorandum of Opinion;

That the highest legal officers of three successive administrations have cast serious doubts on the validity of the informal Wilbur opinion; that I agree with Judge Turrentine that "the decision whether acreage limitation applies under the [Boulder Canyon] Project Act involves important considerations of national policy"; that, in my opinion, and with respect to Judge Turrentine, this case must be appealed to the highest courts so that these "important considerations of national policy" can be finally resolved; that, in such an important case as this, it is no more fitting that Judge Turrentine's opinion should be the last word than should the opinion of the Solicitor of the Department of the Interior.

Dated this 20th day of March, 1971.

FRANK J. BARRY

Frank J. Barry

Subscribed and sworn to before me this 20th day of March, 1971.

BRYCE NOSHER

Notary Public in and for said County and State

[Certificate of Mailing Omitted In Printing]

SACRAMENTO BEE Thursday, February 25, 1971

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Top Officials Oppose Enforcement Of 160-Acre Limit For Water

By Dennis Campbell

"This is not a political issue . . . At least, I hope it isn't."

The Interior Department spokesman's hope was a plaintive addendum to what had begun as a firm denial that politics could influence the federal government's decision to pursue or abandon the enforcement of the 160-acre limitation law in Imperial Valley.

But the issue has been infused with politics.

"A partisan attempt by a lame duck administration" is how Interior Department lawyers characterized the Hoover administration letter exempting Imperial Irrigation District growers from the federal law which requires that farms receiving government-subsidized water be no larger than 160 acres.

A federal judge has rejected that claim of impropriety, and now the Nixon administration must decide whether to appeal the ruling.

Consider the ingredients for politicking now:

—Major landholders in the valley include Irvine Land Co., Purex Corp. and United Fruit Co. "People like that

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Water Controversy

A law which limits the size of farms receiving federally subsidized water has flared into controversy in California. The Nixon administration is deciding whether or not to appeal a federal judge's rejection of the Interior Department's attempt to enforce that law in Imperial Valley. Some water experts claim failure to appeal will have an impact on federal water projects throughout the West. This is the fifth and last article examining the nature of the law and the Imperial Valley issue.

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are more likely to make contributions to Nixon and Reagan than to Humphrey and Unruh," asserts Dr. Ben Yellen, a long-time Imperial Valley antagonist of the growers.

—Gov. Ronald Reagan has taken a strong stand against the acreage enforcement.

—Former US Sen. George Murphy's finance chairman in the 1970 campaign was Charles Thomas, former president of the Irvine Land Co. and now a company consultant. Norton Simon, who lost to Murphy in the Republican primary, says Irvine paid Thomas' salary while he served Murphy, who left office opposing the Interior Department attempt to enforce the acreage law.

—US Sen. John Tunney, who replaced Murphy, opposed the acreage limitation when he was a congressman from Imperial Valley. "He will remain consistent with his earlier position, and he will ask the Justice Department not to appeal," his office says.

—Rep. Victor V. Veysey, Republican who succeeded Tunney, has promised he will go to the White House to block an appeal.

—In October 1949, a young man preparing to run for the US Senate appeared before Imperial Valley growers. He vowed he would fight the 160-acre limitation law. His name was Richard Nixon.

The Interior Department says it will not make the appeal decision. Only a recommendation. "The final decision is with the Justice Department, and they don't always take our advice," an official explained.

The Justice Department says it has "no comment" on the case. "We only make a recommendation. The final decision will be made in Interior," a deputy attorney general advised.

Either Justice or Interior — or perhaps the White House — must make the "final decision" soon. If there is to be an appeal, it must be filed within 60 days of last month's federal court ruling.

The sensitivity of the issue is exemplified by the many officials who, when asked to comment on the case, prefaced their remarks with "Don't quote me, but . . ."

Typical is a high and knowledgeable state water official. "They're getting away with murder in Imperial Valley, costwise," he said. "I don't see why the taxpayers should be heavily subsidizing growers who have thousands of acres."

The conservationists and pro-enforcement experts such as Paul Taylor of UC Berkeley and former Interior Solicitor Frank Barry say they have a precedent of sorts in the US Supreme Court's backing of the acreage enforcement in the Central Valley Project.

Tunney and Veysey and Federal Judge Howard Turrentine, who support the Imperial Valley exemption, stress the injustice of enforcing the 160-acre limitation and compelling the sale of family and corporate lands that have — in many instances — been held for generations.

Says one of the anonymous water consultants:

"It (the Imperial case) ought to be appealed. The Supreme Court should have a shot at it, if only to clarify government policy.

"If the court upholds acreage enforcement in Imperial Valley, and if Congress doesn't like it, then they can amend the law. Acreage enforcement has been like a crazy-quilt. Letting this thing drop where it is will be just stitching another patch onto it."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, *v.* IMPERIAL IRRIGATION DISTRICT, a corporation, *Defendant.* JOHN M. BRYANT, et al., Landowner defendants, both individually and on behalf of members of a class, to-wit, all persons owning more than 160 acres of irrigable land within the Imperial Irrigation District. STATE OF CALIFORNIA, *Intervening Defendant.* BEN YELLEN, et al., *Applicants for Intervention.*	Civil No. 67-7-T ORDER DENYING APPLICANTS' MOTION TO INTERVENE

This cause came on regularly for hearing before the court on the application of Ben Yellen et al. to intervene of right pursuant to Rule 24(a)(2); the United States of America appearing by Assistant United States Attorney, Raymond Zvetina; Imperial Irrigation District appearing by R. L. Knox, Jr.; John M. Bryant, et al, appearing by O'Melveny & Myers, Pierce Works and Charles W. Bender; State of California, intervenor, appearing by Deputy Attorney General Neil Gobar; and Ben Yellen, et al by Arthur Brunwasser. Applicants for intervention have moved for an order permitting intervention; for leave of court to take the deposition of Mr. David Warner, Chief of Litigation, Lands and Natural Resources Division, Department of Justice; and for an order staying implementation of the judgment entered on February 9, 1971, until ten days after

the ruling on these pending motions. The motion to stay implementation of the judgment is hereby ordered denied because there will be no delay in the issuance of the court's ruling. The motion for leave to take the deposition of Mr. David Warner is denied because there is no showing of the necessity therefor. The United States has no duty to disclose its decision concerning appeal during the sixty-day period within which an appeal may be taken.

The court finds that the application to intervene is timely made. Intervention after judgment is permissible if there is no substantial prejudice to the other parties. This litigation is now in its fourth year, and the limited nature of the participation sought, that of appeal, does not disturb the prior proceedings.

All of the defendants assert that the judgment in the 1933 case of *Hewes* v. *All Persons* (Civil No. 15460, Superior Court, Imperial County, California) is *res judicata* as to the applicants for intervention. Proceedings in the *Hewes* case were instituted pursuant to Article 31 of the December 11, 1932 contract between the United States and the Imperial Irrigation District and § 511 of Title 43 of the United States Code. The object of the suit was to determine the validity of the 1932 contract. In this action the question of whether the 160-acre limitation had application to privately owned lands within the District was litigated, and it was held there that the acreage limitation did not apply.

It appears that this proceeding *in rem* was intended to and did bind all persons claiming any right, title or interest in property located within the Imperial Irrigation District and that accordingly the intervention is precluded as a collateral attack upon a judgment entitled to full faith and credit.

However, regardless of the effect of the *Hewes* decision, it is incumbent upon the applicants to demonstrate "an interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2) Federal Rules of Civil Procedure. The interest supporting intervention has been described as a "direct, substantial, legally protectable interest in the proceedings." *Hobson* v. *Hansen,* 44 F.R.D. 18 (1968). The applicants here assert that they desire to buy excess land which may be sold if the government ultimately prevails in this lawsuit and is able to enforce acreage limitation in the Imperial Irrigation District, but this "interest" is no greater than that possessed by the general public. Several specific factors in this case illustrate how extremely speculative and remote is the interest asserted here. Before any possible sale of excess lands, the initial decision in the first phase of the lawsuit must be reversed on appeal. If this occurs, then there will be a second lengthy trial concerning the nature and extent of the landowner defendants' vested rights to Colorado River Water. If the government prevailed in that phase, a plan for disposition would have to be proposed and executed. In all probability, there would be some recognition of the added value of the land due to the efforts of the current landowners. Applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market value. Because this is not a class action intervention, the capability of the named applicants to purchase the lands they desire is material. Furthermore, the requirement of reclamation law for recordable contracts to be approved by the Secretary of the Interior is in no way inconsistent with the customary and usual right of a seller to choose his purchaser. Finally, if the Secretary of the Interior were able to take a more active role in the disposition of excess lands, there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants. Cf. 43 U.S.C. §§ 186, 279.

It is also required that the interest of applicants for intervention be inadequately represented by existing parties. The court has observed the vigorous representation by counsel for United States in urging that acreage limitation applies in the Imperial Irrigation District and finds that the interest of applicants, if any, has heretofore and is now being adequately represented by plaintiff.

Accordingly, it is ordered that the motion for leave to intervene be, and the same hereby is, denied.

DATED: March 29, 1971.

HOWARD B. TURRENTINE
United States District Judge

U.S.A. vs. IMPERIAL IRRIGATION DISTRICT

1/11/67 Fld Complt for Declaratory Jgmt purs to Title 28, Sec 1345, U.S. Code, Issd summons, MADE JS-5 CARD;

1/17/67 Fld Summons returned executed

1/30/67 Fld stip & Order thereon in which to file a mtn or to ans; Deft granted ext of time to & including 4/3/67, (K)

3/16/67 Fld memo of Pts & Auths in suppt of mtn (1) to require joinder of movants as parties Deft under Rule 19, or (2)in the alternative for 1v to movants to intervene as parties Deft under Rule 24, in ea case both individually & as representative members of a class under Rule 23;

Fld ntc of mtn (1) to require joinder of movants as parties Deft under Rule 19, or, in the alternative (2) for 1v to movants to intervene as parties Deft under Rule 24, in ea case both individually & as representative members of a class under Rule 23; Noted for 3/31/67 at 2 P.M.;

LODGED ans of Landowner Deft's;

3/28/67 Fld stip for con't of hrg & for ext of time to plead, & Order thereon, (K) Hrg cont'd to 5/15/67, at 2 P.M.;

5/ 1/67 Fld Pltf's response to mtn (1) to require joinder of movants as parties Deft under Rule 19, or, in the alternative, (2) for 1v to movants to intervene as parties Deft under Rule 24, in ea case both individually and as representative members of a class under Rule 23,

5/11/67 Fld reply memo in support of mtn (1) to require joinder of movants as parties Deft under Rule 19, or (2) in the alternative for leave to movants to intervene as parties Deft under Rule 24, in each case both individually & as representative members of a class under Rule 23;

Fld affidavit of Stephen H. Elmore

LODGED — Proposed Order as presented by atty's for Intervening Defts

5/15/67 Fld Ord allowing intervention of Hohn M. Bryant, Robt C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Chas. E. Nilson, Kakoo D. Singh, Stephen H. Elmore, and John Kubler, Jr., as Deft's & for filing of ans heretofore Lodged;

5/16/67 Fld ans of Landowner Deft's heretofore Lodged on 3/16/67;

5/17/67 Fld notice of mtn of the State of Calif., Noted for 6/5/67 at 2 PM
LODGED — Answer of Deft State of California

5/17/67 Fld affid of serv by mail; Fld receipt for service;

5/19/67 Fld ans of Imperial Irrig Dist.;

5/19/67 Fld notice of P/T hrg, Noted for Aug 7, 1967, at 2 P.M.;

6/1/67 Fld stip for con't of hrg on mtn of State of Calif, & Ord thereon, Cont'd to 6/26/67 at 2 P.M., (K)

6/16/67 Fld memo of Pts & Auths in oppo to mtn of the State of Calif (1) for leave to intervene under Rule 24 as a party Deft; or (II) to require joinder under Rule 19 of the State of Calif as a party Deft;

6/21/67 Fld reply memo of movant State of Calif in support of its motion;
I. For leave to intervene under Rule 24 as a party Deft; or
II. To require Joinder under Rule 19 of the State of Calif as a party Deft;

7/7/67 Ent mtn of State of California to Intervene or Joinder as party Deft; Motion submitted;
Fld notice of mtn to produce or to permit copying, Noted 8/7/67 at 2 P.M.; Fld mtn to produce or to permit inspection & copying;
Fld affid in suppt of mtn to produce or to permit inspection & copying;
Fld statement of reasons in suppt of mtn to produce or permit copying;

7/ 7/67 Fld memo of Pts & Auths in suppt of Deft's mtn to produce, or to permit inspection & copying of documents under F.R.CIV.P 34;

8/ 4/67 Hearing to produce or permit inspection is cont to 8/25/67 at 2 PM. Pre-trial hearing cont to Nov. 20, 1967 at 2 PM. (K)

8/ 3/67 Order granting leave of the state of Calif. to intervene. (K)

8/ 7/67 Fld petition for leave to appear Amicus Curiae in support of the Plaintiff;

8/15/67 Fld memo of Pts & Auths in oppo to Deft's mtn to produce or to permit inspection & copying of documents under Rule 34, F.R.CIV.P;
Fld affid of N. O. WOOD, JR., Director of management operations, Office of the Secretary of Interior; Fld affid of service;

8/24/67 Fld Further Notice re: Deft's mtn to Produce or to Permit Inspection & Copying of Documents Under Rule 34 Fed. R. Civ. P (K)

8/25/67 Fld stip Re Mtn to Produce & Proposed Ord thereon, (K)

9/22/67 Fld Order granting mtn of Petnr's to appear Amicus Curiae;
Fld memorandum of operations, (K)

11/ 9/67 Ent mtn of Deft's to produce or to permit copying advanced fr 2 P.M. to 10:30 A.M. for prelim hrg in chambers, Hrg advanced to 11/20/67 10:30 A.M.; Pre-Trial advanced fr 2 P.M. to 10:30 A.M.; Counsel notified;

11/20/67 Ent Mtn to Produce — Settled; P/T ord cont'd to 6/6/68, 9:30 A.M.

4/ 3/68 Fld Notice of Change of Address of Atty for Amicus Curiae;

5/24/68 Fld minute Ord con't P/T hrg to 9/13/68, at 2 P.M., (K)

5/28/68 Fld Landowners Brief No. 1, Brief No. 1 (Appendex 1) (Appendix No. 2) and Appendix No. 3;

8/ 8/68 Fld Landowners Brief No. 2, Vol I, Vol II, Vol III;

9/13/68 Fld stipulation of facts;

9/16/68 Ent Ord file prelim stip.; Final stips to be fld by 10/7/68; All briefs to be fld by 12/1/68; Trial set for 1/15/69 at 9:30 AM, (K)

10/ 2/68 Fld statement in lieu of opening brief;

10/ 7/67 Fld Pltf's P/T brief;

10/ 7/68 Fld list of witnesses who will testify on behalf of the landowner Deft's;

10/22/68 Fld stipulation re exhibits by & between ea & all parties;

10/30/68 Fld note of change of Address of Attys as to O'Melveny & Myers;

10/30/68 Fld list of witnesses who will testify on behalf of the U.S.A.;

11/ 1/68 Fld Pltf's reply brief to Landowners brief No. 1 & Landowners brief No. 2;

11/ 7/68 Fld reply brief of Landowner Deft's;

11/ 7/68 Fld Interrogs to Pltf propounded by Landowner Deft's;

11/14/68 Fld P/T brief of intervening Deft's State of California;

11/20/68 Fld stip for ext of time for Pltf to respond to Interrogs propound by Landowner Deft's, & Order thereon, (K) Time ext to & include 12/20/68;

11/22/68 Fld Notice of Taking Depositions;

11/27/68 Fld response of Landowner Deft's to Pltf's reply brief;

12/ 9/68 Fld Notice of Taking Depositions; (Deft Imperial Irrigation Dist);

12/10/68 Fld Notice of Taking Depositions by Atty's for Pltf; Landowner Deft;
Fld Revised List of Witnesses who will testify on behalf of the Landowner Deft's;

12/30/68 Fld stip for ext of time for Pltf to respond to Interrgs propounded by landowner Deft's & Ord thereon, (K) Time ext to & include 1/6/69;

1/ 6/69 Fld answers to Interrogatories of Deft;
Fld revision of list of witnesses to be called by the U.S.A.;

..../10/69 Fld depositions of John Randolph Riter and Edmund Barbour;

..../10/69 Fld Second Set of Interrogs propounded to Pltf by Landowner Deft's;

..../21/69 Fld deposition of Edward Weinberg;
Ent Ord con't trial to April 2, 1969, at 9:30 A.M.;

..../27/69 Fld stip for ext of time for Pltf to respond to the second set of interrogs propounded by Landowner-Deft's; Time ext to & include 2/28/69, (K)

..../27/69 Fld stip & Ord for con't of trial date, (K) Cont'd to 4/2/69, at 10:00 A.M.;

..../ 7/69 Fld Pltf's ans to Second Set of Interrogs propounded to Pltf by Landowner Deft's; Affid of Service by Mail;

..../23/69 Fld Minute Ord that trial be cont'd to 6/18/69, at 9:30 A.M.; (K)

..../ 3/69 Fld Depositions of Kakoo Singh, Robert C. Brown & John Kubler, Jr.;

..../ 9/69 Fld depositions of Clara Maria Gutierrez, Theodore Benjamin Shank, Harold Anderson Brockman, John M. Bryant, Charles Edward Nilson and Stephen Henry Elmore;

..../19/69 Fld notice that trial date be cont'd to 10/6/69, at 9:00 A.M.;

..../21/69 Fld deposition of Robert F. Carter;

..../15/69 Fld response of Pltf to Landowner-Deft's reply brief;

..../30/69 Fld stip & Ord for con't of trial date, (S) Ord cont'd to 2/2/70, at 9:30 A.M.;

..1/26/69 Fld Ord setting prelim P/T conf, & Ord vacating trial date, (S) Cont'd to 1/30/70, & the trial date of 2/2/70 is hereby vacated;

1/ 7/70 Fld Ord con't P/T hrg, (S) Cont'd to 7/17/70, at 2 P.M.;

..../27/70 Ent ord that the pre-trial setting presently scheduled for 7/17/70 is hereby cont until 9/25/70 at 2 P.M. Counsel notified, (T)

7/ 6/70 Fld request for admissions by Landowner Defts with exh A attached;

7/ 8/70 Fld amendment to request for admissions by Landowners Deft.

7/16/70 Fld report RE status of the litigation;

..../ 7/70 Fld Deft Landowners Interrogatories of 8/6/70 to Pltf;

..../17/70 Fld Pltf's stipulation and ord thereon for cont to 9/15/70 within which the Pltf may have to respond, (T)

9/15/70 Fld stipulation and order thereon extending time to 9/21/70 within which plaintiff may respond to Interrogatories of 8/6/70. (T)

9/22/70 Fld Pltf's mot for protective ord; T/W; memo in support of mot for protective ord; Fld Pltf's response to landowners Deft's request for admissions; Pltf's objections to interrogatories of 8/6/70; Answers to Deft's interrogatories of 8/6/70; and certificate service, with exhs 1 thru 24 attached;

9/23/70 Fld stipulation and ord that pltf may have to and including 9/21/70 within which to respond to admissions of fact submitted in July 1980. (T)

9/23/70 Fld Landowner Defts summary brief of principal P&A's raised by Deft's;

9/25/70 Fld catalog of exhibits to be offered by pltf;

..../25/70 Ent ord set for trial 12/1/70 at 10 A.M. all discovery, exchange of witnesses names and agreement of facts to be completed by 10/29/70. Tentative Date of 11/13/70 at 2 P.M. for any other matters, (T)

10/15/70 Fld stipulation on by Landowner Defts RE: trial procedure and order submitted therewith, (T)

..../27/70 Fld amended list of deft landowners' witnesses advisement as to State's witnesses; Fld notice on behalf of all defts re completion of discovery proceedings, lack of objections to facts heretofore stipulated to and withdrawal of objections to certain of plntf's exhibits;

10/28/70 Fld notice re witness for deft Imperial irrigation district, T/W affid of service;

11/ 9/70 Fld notice of stipulated facts to which pltf does not object;

11/23/70 Fld summary brief of plaintiff, T/W affid of service;

11/23/70 Fld plaintiff's objections to exhibits to be offered by defts, T/W affid of service;

11/30/70 Fld amended list of Plaintiff's witnesses, with certificate of service;

11/30/70 Lodged findings of fact and conclusions of law proposed by Landowner Defts;
Fld memo RE: Defendants' objections to Pltf's documentary evidence;

11/30/70 Fld findings of fact and conclusions of law proposed by pltf;

12/ 1/70 COURT TRIAL; Fld Exhs & witnesses, (T)

12/ 2/70 FUR COURT TRIAL: Fld list of witnesses & exhs;

12/ 3/70 FUR COURT TRIAL: Fld list witnesses & exhs;

12/ 7/70 FUR COURT TRIAL;

12/ 8/70 FUR COURT TRIAL;

12/21/70 Fld plaintiff's Brief of Amicus Curiae in support of Plaintiff T/W affid of service;

1/ 5/71 Fld memo opinion, (T)

2/ 9/71 Fld judgment — It is ordered and decreed the deft Imperial Irrigation District is not bound by the land limitation provisions of Reclamation Law in the delivery of Colorado River Water to any of the privately owned lands within the boundaries of Imperial Irrigation District. The land limitation provisions of Reclamation Law have no application to privately owned lands lying within the Imperial Irrigation District and accordingly the owners of such lands are in no case required, as a condition to receiving water, to execute recordable contracts pursuant to the provisions of Section 46 of the Omnibus Adjustment Act of May 26, 1926, 44 Stat. 649, 43 U.S.C. Section 422e, as amended. The land limitation provisions of Reclamation Law have no application to land owned by the State of California in its Imperial Water Fowl Management Area. (T) (ENTERED 2/9/71/ MADE JS-6 CALAD

3/18/71 Fld notice of change of address of attorney for amicus curiae — Arthur Brunwasser, 445 Sutter St, Suite 501, San Francisco, Ca. 94108;

Fld notice of mot to Intervene — for leave to take deposition & for stay of implementation of judgment pending ruling on mot to intervene;

Fld applicant's memorandum in support of mot to intervene — Noticed for 3/29/71 at 10 A.M. LODGED protective notice of appeal, without payment of filing fees or bond;

3/25/71 Fld memorandum of landowner defendants in opposition to motion of applicants for intervention;

Lodged Affidavit of Charles W. Bender in support of opposition and order waiver of local rule 3(e)(2)a;

3/26/71 Fld affidavit of Charles W. Bender in support of application for order waiving requirement of local rule 3(e)(2)a with order thereon granting same, (T)

3/26/71 Fld Deft's response of Imperial Irrigation District to motion to Intervene;

3/29/71 Fld affidavit of Frank J. Barry in support of motion to intervene;

Fld affidavit of Ben Yellen in support of motion to intervene;

Fld affidavit of Carl R. Grimsley in support of mot to intervene;

Fld affidavit of Adelaido R. Vasquez, Jr. in suppt of mot to intervene;

Fld affidavit of Jorge Moreno in support of mot to intervene;

3/29/71 Fld affidavit of Albert Armstrong in support of mot to intervene;

Fld affidavit of Macario F. Pacheco in support of mot to intervene;

Fld affidavit of Ygnacio Salazar in support of mot to intervene;

Fld affidavit of Pablo Diaz in support of mot to intervene;

Fld affidavit of Eugenio Ponce in support of mot to intervene;

Fld affidavit of Alejo Cortez in support of mot to intervene;

Fld affidavit of Mike Miranda in support of mot to intervene;

3/29/71 Fld order denying applicants motion to intervene, (T) Mld copies to counsel

3/29/71 Ent ord mot to intervene — Denied; Motion to take deposition — Denied; Motion for stay of Implementation of Judgment — Denied; Court to prepare order, (T)

..../ 5/71 Fld notice of appeal by applicants for intervention re order made and entered 3/29/71 denying applicants' mot to intervene together with filing fee of $5.00;

..../ 7/71 Fld $250.00 Pacific Employers Insurance Company appeal bond;

..../12/71 Fld designation of transcript on appeal;

..../20/71 Fld amendment to notice of appeal;

5/20/71 Fld Designation of Record on Appeal;

..../14/71 Fld orig & 3 cpys reporter's transcript;

10/19/71 Mld clerk's record w/tran to CA.

Supreme Court, U. S.
FILED
NOV 13 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

Nos. 79-421, 79-425 and 79-435

JOHN M. BRYANT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

STATE OF CALIFORNIA, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

IMPERIAL IRRIGATION DISTRICT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

ARTHUR BRUNWASSER
240 Stockton Street, Third Floor
San Francisco, CA 94108
Telephone: (415) 391-2203
Attorney for Respondents

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

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TABLE OF AUTHORITIES CITED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

Nos. 79-421, 79-425 and 79-435

JOHN M. BRYANT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

STATE OF CALIFORNIA, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

IMPERIAL IRRIGATION DISTRICT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

STATEMENT

The petitions before the Court are filed in behalf of 150 farming operations of 1,000 acres or more who own most of the excess lands in the Imperial Valley of California.[1] This dispute has been in the courts for 12 years. The Court of Appeals considered the highly technical and overly ingenious arguments of petitioners over a period of 39

[1]The latest figures available to the U.S. Department of Agriculture are for the year 1974. They show that at that time, there were 715 farming operations in the Imperial Irrigation District averaging 716 acres per farm. Farm numbers and sizes were distributed as follows:

Land in Farms	Number of Farms
Less than 50 acres	194
50 to 179 acres	141
180 to 499 acres	139
500 to 999 acres	91
1,000 to 1,999 acres	73
2,000 acres and over	77

121,892 acres were farmed by corporate owners, with an average of 1,463 acres each. Farms of all types of ownership were distributed by type of business organization as follows:

Type of Business	Number	Average Size
Sole proprietorships	505	490 acres
Partnerships	120	1,175 acres
Corporations	84	1,463 acres
Others	6	113 acres

The Department of Agriculture concluded:

> "The U.S. Department of the Interior has estimated 265,000 acres (60 percent of the irrigated acreage) in the District are excess land. It seems likely that much of the excess land is farmed by the 150 farming operations that exceed 1,000 acres in 1974 and is probably owned by the 204 partnerships and corporations shown above."
>
> *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis,* Staff Report by the Economics, Statistics, and Cooperatives Service, U.S. Dept. of Agriculture, No. ECCS-04, p. 17 (1978).

months while this case was under submission until the principal opinion was filed. The Court had before it a total of 17 detailed, extensive and sometimes over-length briefs on both the merits and procedural issues of standing and intervention. Almost 300 trial exhibits, consisting of both legislative and administrative materials, were transferred to the panel for review.

The carefully documented, well-reasoned principal opinion was immediately challenged by petitioners who sought rehearing and suggested rehearing in banc. The rehearing petitions raised most of the issues petitioners seek to raise in this Court. The panel requested and received an Answer from respondents. Rule 40(a), Fed.R.App.P. Although the Government did not file a brief in the Court of Appeals, the Assistant Attorney General of the Land and Natural Resources Division notified the Court that "[T]he United States agrees with and supports the response" of respondents to the rehearing petitions. The panel considered the rehearing petitions for an additional 20 months and then filed its supplemental opinion denying rehearing. The panel voted to reject the suggestions for a rehearing in banc. The full Court was advised of the suggestions for an in banc rehearing, and no judge in regular active service requested a vote on the suggestion. Rule 35(b), Fed.R. App.P. Dist.App. 69a-70a[2], 595 F.2d at 528.

[2]"Dist.App." will be used in this memorandum to designate the appendix of petitioner Imperial Irrigation District. "Dist. Pet." will designate the District's petition and "Bryant Pet." will designate the petition of Petitioners John M. Bryant, et al.

The Imperial Irrigation District (hereafter "District") was the original defendant in the District Court. The District is a unit of self-government organized to deal with water distribution (*Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 721-23 (1973)), and the conduit for the federal water subsidy between the federal government and the landowners. The Bryant

The Application of Reclamation Law to Privately Developed Lands

Reclamation projects generally serve multiple purposes such as flood control, recreation, protection of fish and wildlife, and irrigation. The proportionate costs of constructing a project attributable to irrigation are repaid to the Government over a period of 40 years, often extended to 50 years, interest free. In general, repayment today is by state or quasi-state agencies such as irrigation or water districts which in turn pass on these repayment costs to the owners of land who receive benefits from the project.

The Reclammation Act, originally enacted in 1902 and supplemented on numerous occasions thereafter, provides in general for the construction and operation by the Government of various dams and appurtenant facilities for the purpose of storing, conserving and regulating the supply of water in the Western states. Although couched in terms which appear to limit its application to the "re-claiming" of arid public lands, privately owned lands having privately developed means of irrigation have been brought

---

petitioners intervened in the District Court as the class representatives of the owners of excess lands and carried the major burden of defending the case against enforcement of the 160 acre limitation in both the District Court and the Court of Appeals. They are referred to in the lower court decisions and the record as the "landowner defendants".

The State of California also intervened as a defendant in the District Court. However, all parties agreed that the reclamation law had no application to the Imperial Water Fowl Management Area owned by the State of California, thus granting California all the relief it requested. 332 F.Supp. 11; 595 F.2d 524. The State of California no longer has a direct interest in the subject matter of this controversy and this Court has no jurisdiction to consider its petition.

into reclamation projects almost from the beginning of the reclamation program in 1902. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 283 (1958); *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1112 (1977), *cert. denied,* 429 U.S. 1121. As far back as 1903, the First Annual Report of the Reclamation Service said:

> Recognizing the fact that there is scarecly a section of the country in the United States, even in the most sparsely settled regions of the West, where an irrigation project would not involve the reclamation of lands in *private ownership*, as well as those belonging to the United States, this section [§ 5 of the 1902 Act, 32 Stat. 389, 43 U.S.C. § 431] authorizes the sale of the right to use water for land in private ownership, to be limited, however, to the amount required for a tract not exceeding 160 acres. (emphasis added). *First Annual Report of the Reclamation Service,* H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902).

The existence of pre-project irrigation facilities, such as those in the Imperial Valley, is without significance when considering the application of reclamation law. Bringing "new water" to an area is not the only, or even the primary, benefit of the reclamation program. It is the regulated flow of stored water that is the major benefit of a reclamation project. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1113. The regulated flow of the previously erratic Colorado River not only saved the Imperial Valley from periodic flooding and droughts but also brought about a vast increase in agricultural productivity which would have been impossible without the project. For example, at trial, a government witness testified that agricultural losses in the Imperial Valley during the drought of

1934 proximated $10,000,000, or about a 25 percent loss of the total value of agricultural production. Water shortages would have been approximately 60-75% of the Valley's requirements without the project in 1940, 1944, 1948, 1956, 1960, 1963 and 1966, and estimated losses during these years would have come to $95,000,000. (RT 454:6-455:3)

These vast benefits, only briefly summarized above, were provided to the landowners of the Imperial Valley free of cost. The District's financial obligation for the cost of constructing the All American Canal was fixed at $25,000,000. To date, all payments have been made from net power revenues derived from the sale of electrical energy generated by hydro-electrical facilities on the All American Canal. Although the District spent approximately $15,000,000 to construct the hydro-electric facilities, (Dist.App.84a, 322 F.Supp. 14) these facilities were built at the expense of all of the approximately 75,000 residents of the Valley, not the 150 farming operations in whose behalf the present petitions have been filed. With respect to the power generating facilities, a government witness testified at trial that the Bureau of Reclamation provided foundation structures at a cost of $1,363,000 for the powerhouse structure foundations which were included in the repayment contract. (RT 458:23-459:11) The federal government provided additional financial assistance for the construction of the power generating facilities. During the period of construction, 1935 through 1938, there was a very unfavorable bond market and the Public Works Administration provided grants for over $2,000,000 and there were loans by the Public Works Administration of over $2,500,000 for

two power drops. The 1938 Annual Report of the District stated: "You own a modern efficient power service representing, on completion, an investment of $5,360,000, more than $2,000,000 of which was a direct gift to you from the Federal Government." (*Id.* 459:23-460:10)

In summary, government witnesses testified that all of the various benefits provided to the landowners of the Imperial Valley, including the repayment of construction costs on an interest free basis over a period of 50 years, would average $330 to $1,060 per acre over the 440,000 acres of irrigated land in the Valley. (RT 478:22-24) The District must certainly be speaking with tongue in cheek when it refers to the "windfall" expected by respondents as a result of this case.

The benefits of the reclamation program are so vast and significant that owners of excess land have never hestitated to execute the recordable contract required by § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, 42 U.S.C. § 423e. The historic willingness of owners of more than 160 acres to execute recordable contracts was illustrated by the testimony of Harry W. Horton, who was chief counsel for the Imperial Irrigation District. In testifying about the 160 acre limitation and the requirement of the recordable contract in § 46 (which requires the landowner to dispose of his excess lands within 10 years as a condition to the receipt of project water on the excess lands), Mr. Horton said:

> Let us lay the cards on the table . . . I will give you my own opinion of Jack O'Neill's willingness to sign the 160 acre limitation. He thinks if he gets water for ten years on there without having to sell it, he can make

enough money out of it so he can afford to sell it at any old price. *Hearings on S1425, 2541, 3448*, Before Subcomm. on Irrigation and Reclamation of Sen. Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 87, 88 (1958).

Background of the Dispute

This case had its genesis in an attempt by the government to resolve conflicting administrative interpretations concerning the application of the 160-acre limitation of reclamation law under the Project Act in the Imperial and Coachella Valleys of California. Both valleys are served by the All American Canal. When Colorado River water was initially stored behind Hoover Dam in Lake Mead and delivered through the newly completed All American Canal in the early 1940's, the acreage limitation was not applied in the Imperial Valley, purportedly because of the informal letter opinion of Secretary Wilbur. Dist. App. 213a, 71 I.D. 529. A formal Solicitor's opinion was issued on May 31, 1945, concluding that the acreage limitation did apply in the Coachella Valley. Sol.Op.M-33902, 71 I.D. 533. Thus, the acreage limitation was interpreted to apply in the Coachella Valley, but not the Imperial Valley, although water was delivered under the Project Act to both through the All American Canal.

Doubts were soon raised within the Interior Department as to the legal conclusions of the Wilbur letter. The conflicting decisions were resolved administratively on December 31, 1964 when Frank J. Barry, Solicitor of the Department of Interior, issued his opinion, concluding:

> The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose

> acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been said by Congress as its plain intent.
>
> The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress.
>
> . . .
>
> I have concluded, after a consideration of all issues, that. . . . : Privately owned land in Imperial Irrigation District, even those assumed to have vested Colorado River water rights, are subject to the excess land laws. Sol.Op.M-36675, 71 I.D. 496, 518-19.

Petitioners' response to Solicitor Barry's opinion is to ignore it. But the Court of Appeals considered the Barry opinion to be "thorough and comprehensive" (Dist.App. 54a, 559 F.2d 539) while rejecting the informal Wilbur letter's "rather simplistic analysis not contained in a formal opinion" (Dist.App.55a, 559 F.2d 539). Careful examination of the Wilbur letter reveals that it fails to mention the various arguments advanced by petitioners in this Court to support their claim that the Project Act does not require application of the reclamation laws in the Imperial Valley.

Almost four years after the government filed suit for a declaratory judgment, the District Court entered judgment for the District and the intervening excess landowners who are before this Court as petitioners. The Government did

not appeal.[3] Respondents intervened for purposes of appeal and the decision of the District Court was reversed.

---

[3]The District refers to private correspondence from former Solicitor General Griswold defending his decision not to appeal, but does not bother to set that explanation in context. An examination of the Congressional Record discloses that Solicitor General Griswold was compelled to provide a private explanation—no public explanation was ever given—because of a critical letter he received from a private citizen in Manhattan, Kansas who read about his decision not to appeal in a magazine:

> . . . The report of your part in the decision not to appeal makes you appear to be a man of little integrity. If you can explain how a man with respect for the law of the land, as passed by Congress and validated by the President's signature can countenance such action, or lack of it, I would appreciate hearing it.
>
> The whole action smells of rot at the core of our government and makes me wonder whether the long-haired kids who talk of getting rid of it may not have some validity to their thinking.
>
> Yours with dwindling respect,
>
> Mrs. Stephen L. Stover.

It is significant that Solicitor general Griswold's letter and its erroneous conclusion evoked a response from Professor Joseph L. Sax, author of the leading text on the Reclamation Act:

> September 1, 1971.
>
> Hon. Erwin N. Griswold,
>
> Solicitor General of the United States, U.S. Department of Justice, Washington, D.C.
>
> Dear General Griswold:
>
> Someone sent me a copy of a letter that went out under your signature, dated June 1, 1971, to Mrs. Stephen L. Stover of Manhattan, Kansas. The letter inquired about the position of the Justice Department in the excess land case involving the Imperial Valley in California.
>
> As one who has written about the Reclamation law, I was surprised to see in your letter the following:
>
> ". . . There is a provision in the reclamation laws which provide that when land is reclaimed through a federal project, land holdings cannot exceed 160 acres . . . no land was reclaimed by the construction of the All-American Canal."
>
> Occasionally one recalls the warnings he received in law school, among them the danger in paraphrasing statutory language. My recollection is that the excess land provision of the Reclamation Law, 43 U.S.C. Section 431, says:

ARGUMENT

There Are No Special And Important Reasons For Granting The Writ

The petitioners do not contend that the decision of the Court of Appeals is in conflict with that of another court of appeals on the same matter. They do not even suggest that the determination of the applicability of the 160-acre limitation of reclamation law in the Imperial Irrigation District of California is anything other than an issue of unique local importance. The decision by the Ninth Circuit is completely consistent with its earlier decision in *United*

> "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one land owner."
>
> I recall no general provision in the law that limits the excess land law to land "reclaimed through a federal project," and if you examine the legislative history of the statute, you will recall that Representative Newlands, the sponsor of the Act, took no such view. 36 Cong.Rec. 6734 (1902). Of course a great many reclamation projects involve the supply of supplementary water to land already in cultivation. To the best of my knowledge it has never been thought that this fact exempted the project from the provision of the excess land law.
>
> I recognize that the Imperial Valley case was a complex one; but I think Mrs. Stover was entitled to a more accurate explanation.
>
> Very truly yours,
>
> Joseph L. Sax,
>
> Professor of Law.

The correspondence of Solicitor General Griswold and Professor Sax is found in 117 Cong.Rec. 46226-46229 (1971). This decision not to appeal is also explained in Taylor, *Water, Land & Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 Natural Resources Journal 1, 17-23 (1973). Copies of the exchange of correspondence referred in the Congressional Record and Professor Taylor's commentary and Mrs. Stover's letter are reproduced in *Will The Family Farm Survive in America?* Joint Hearings before Senate Select Comm. on Small Business and Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1A, pp. 565-568, 571-574, 588-589. (1975). Another explanation was provided by the *Sacramento Bee* edition of September 16, 1973. *Id.* at 601-03.

States v. Tulare Canal Co., 535 F.2d 1093 (1977), *cert. denied*, 429 U.S. 1121[4] and this Court's decision in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958).

Petitioners seek to bring themselves within the standards of this Court's Rule 19(b) by alleging that the panel's decision is in conflict with the various decrees of this Court in the *Arizona v. California* litigation insofar as the present case may require the application of acreage limitation to the Imperial Valley despite the "present perfected rights" of the District. Significantly, neither Secretary Wilbur nor Executive Assistant Ely considered "present perfected rights" to be relevant to the issues raised by petitioners.

In the landmark case in the area of federal reclamation law, *Ivanhoe Irrig. Dist. v. McCracken*, this Court enunciated the controlling law of statutory construction:

> Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactments. *Id.* at 292.[5]

[4]The landowners in *Tulare* sought to have the Federal courts rewrite the Flood Control Act of 1944 by providing the exemption Congress failed to adopt. The Ninth Circuit declined.

[5]This Court's reasoning is not subject to challenge. Where special circumstances exist, Congress has specifically provided for exemptions from the excess-land provisions of the Federal reclamation laws. Act of June 27, 1952, 66 Stat. 282 (San Luis Valley Project, Colorado):

> "The excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado: . . ."

The Act of July 24, 1957, 71 Stat, 309 (Missouri River Basin, East Bench Unit) provides:

> "Except as provided in section 2 of this Act, the excess land provisions of the Federal reclamation laws shall not apply to lands in the . . . of the East Bench unit of the Missouri River Basin project, . . . that are irrigated under existing State water rights, whether the waters used for their irrigation are passed through, regulated by, or stored in the Clark Canyon Reservoir by the United States."

The Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande Project, Mercedes Division) provides:

> "The excess-land provisions of the Federal reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed."

There are numerous other examples.

Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. § 386 (Colorado-Big Thompson Project); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt Projects); Act of August 28, 1954, 68 Stat. 390 (Owl Creek Unit, Missouri River Basin Project); Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. § 422(f) (small reclamation projects); Act of September 4, 1957, 71 Stat. 608 (Kendrick Project); Act of December 22, 1959, 72 Stat. 641 (Lower Rio Grande Rehabilitation Project, La Feria Division); Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. § 835a (Columbia Basin Project).

The reasons for these clear, unambiguous exemptions are explained by Professor Sax in 2 Waters and Water Rights, § 120 at pp. 215-16 Clark ed. (1967).

The Ninth Circuit, following the rule of *Ivanhoe*, and its own previously decided case of *United States v. Tulare Lake Canal Co., supra*, searched the language of the Project Act and was unable to find a specific exemption. Petitioners appear to be confused about the rule of statutory construction, for they emphasize its converse: *"The Project Act makes no mention of acreage limitations on private lands . . ."* Dist. Pet. 10 (emphasis by District).

Their argument that this Court's decision in *California v. United States*, 338 U.S. 645 (1978) intended to weaken the *Ivanhoe* rule in favor of protecting state water rights of individuals conflicting with the acreage limitation is without merit. The majority opinion of Mr. Justice Rehnquist did not conclude that individual water rights under

state law protected by Section 8 of the Reclamation Act of 1902 are superior to the 160-acre limitation provided in Section 5. To the contrary, Justice Rehnquist was perfectly clear when he pointed out that any purported clash between the acreage limitation mandated by Section 5 and the requirement in Section 8 for the application of state law could be resolved only in favor of Section 5. Section 5 was considered to be a specific congressional directive to which state water law must give way if inconsistent. *Id.*, 438 U.S. at 668-69, n. 21.

Petitioners Have Recognized That It Is In Congress, Not The Courts, Where Relief Is Available

In essence, the Court of Appeals declined the invitation to rewrite an act of Congress and held that a clearly erroneous administrative practice cannot thwart the plain purpose of a valid law. *United States v. City & County of San Francisco*, 310 U.S. 16, 31-32 (1940). This principle was acknowledged by the Department of the Interior shortly after the Project Act was enacted. Prior to execution of the Wilbur letter, Northcutt Ely, who was then Executive Assistant to Secretary Wilbur and is now Attorney for the District in the present case, recognized that the acreage limitation must be enforced in absence of legislative change:

> The Reclamation Law's Limitation of 160 acres to a particular owner presents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area. I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutory effect on suspected speculative activities in that locality. 71. I.D. 528 (Nov. 4, 1930).[6]

Petitioners now acknowledge that their remedy lies with Congress, as the present attorney for the District recognized many years ago. Their Congressman, Clair W. Burgener, stated, while testifying last year before the Senate Subcommittee on Public Lands and Resources:

> "The lawyers tell us there is some reason why we would not end up in the Supreme Court." *Acreage Limitations in Bureau of Reclamation Projects*, Hearings before Subcomm. on Public Lands and Resources of Sen. Comm. on Energy and Natural Resources, 96 Cong. 2nd Sess., Part 3, 255 (1978).

The September 2, 1977 edition of *The Brawley News*, a newspaper in the Imperial Valley, provided the reason. It quoted Charles Bender, attorney for the Bryant petitioners, as stating that this case "doesn't have any broad impact on any other irrigation district".

So certain was Congressman Burgener about the outcome of this proceeding that he introduced a bill on January 14, 1978 to exempt the Imperial Irrigation District from all of the anti-monopoly provisions of the Reclamation Act. H.R. 13126, 96th Cong., 2d Sess. (1978).

On September 14, 1979, the Senate passed a bill to specifically exempt the Imperial Irrigation District from the anti-monopoly provisions of the reclamation law. In pertinent part, S.4, 96th Cong., 1st Sess., provides:

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[6]The excerpted portion from the record of the Interior Department was cited on numerous occasions throughout the course of this case. Although readily available, Mr. Ely was not called by petitioners to testify at trial to either explain the Department's contemporaneous construction of the Project Act quoted above or the questionable circumstances surrounding execution of the Wilbur letter.

Sec. 8 (c) (1) The following provisions of the Federal Reclamation Law shall not apply to land within the Imperial Irrigation District of California on January 1, 1979.

(A) Section 5 of the Act of June 17, 1902 (43 U.S.C. 431);

(B) Section 46 of the Act of May 25, 1926 (43 U.S.C. 423e); and

(C) any other provision of law amendatory or supplementary to either of such sections.

125 Cong. Rec. S-12594 (daily ed. Sept. 14, 1979)

On November 7 and 8, 1979, the House Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs was scheduled to hold hearings in Denver, Colorado to consider legislative proposals presently before the House pertaining to the Reclamation Law, including S.14. *Press Release* from House Committee on Interior and Insular Affairs, October 11, 1979.

The utter futility of the present petitions is no better indicated than in the personal attacks hurled at the Court of Appeals by the Bryant petitioners both in this Court and before the Senate subcommittee. In voicing their disagreement with the panel's refusal to accept the "rather simplistic analysis" of the informal Wilbur letter as the determinant in considering the validity of the administrative practice, the Bryant petitioners charge the Court of Appeals with having "launched a relentless, unprincipled attack" on the administrative construction of the Project Act and having acted "in quest of its chosen result". Bryant Pet. 24. The Court was taunted for having "attempted to justify its upside-down approach" (*Id.* at 25) while it "strained to contrive an interpretation consonant with its

desired result" as part of "the court's misdirected bias" (*Id.* at 27) and "stretched to discount the legislative evidence at every turn" by presenting a "contrived explanation" of Congressional testimony (*Id.* at 28).

Individual members of the class of excess landowners represented by the Bryant petitioners were equally respectful of the Court of Appeals when they appeared before the Senate subcommittee last year urging a legislative exemption for the District. They referred to the "panel of three judges who have probably never even seen the Imperial Valley and certainly don't know the first thing about farming there". *Acreage Limitations in Bureau of Reclamation Projects, supra at 438.* Another spokesman referred to "a three-judge panel, including a retired circuit judge and a district court judge". (*Id.* at 444.) No mention was made that Circuit Judge Koelsch did not go on senior status until only after this case was taken under submission, or that the third judge on the panel was the chief judge of the Ninth Circuit.

The innuendos hurled at the Ninth Circuit by petitioners, both in this Court and before Congress, cannot detract from their total failure to establish sufficient grounds for granting the writ.

CONCLUSION

The various arguments of petitioners received the careful consideration of the panel. The entire Ninth Circuit reviewed the panel's two opinions and no disagreement was registered. Further review is unwarranted and the petitions should be denied.

Dated: November 11, 1979,
San Francisco, California

Respectfully submitted,

ARTHUR BRUNWASSER
Attorney for Respondents

NOV 30 PAGE 2

Supreme Court U.S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
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Respondents.

REPLY BRIEF OF BRYANT PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MEMORANDUM

TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court; and

Counsel for California Brewers and International Brotherhood of Teamsters

FROM: James Wolpman and Michael P. Goldstein, counsel for Abram Bryant

RE: **Corrections in Respondent Bryant's brief in No. 78-1548**

We regret that there are a number of printing errors in the brief which we submitted. Some will cause the reader little difficulty, but four should be corrected to avoid confusion:

p. 8, blank space mid-page--insert:

cation of seniority

p. 46, last line before indented quotation--change as follows:

~~future~~ nature of the purported seniority system,

p. 50, line 8--change as follows:

can be calculated in a smaller unit than ~~plantwise~~ plantwide

p. 52, line 6--change as follows:

§703(h) ~~inapplicable~~ applicable. Two other cases cited by the Union

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No. 79-421

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vs.

BEN YELLEN, et al.,
Respondents.

REPLY BRIEF OF BRYANT PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Four specific questions are presented in the Imperial Valley farmers' Petition for Certiorari. (Bryant Petition, pp. 2-3.) For the most part, respondents' Memorandum in Opposition simply ignores those questions[1]. It does raise

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1. For example, the landowners' petition shows that the Court of Appeals' nullified the final judgment in *Hewes v. All Persons,* thus usurping state jurisdiction to settle the rights of all parties, once and for all, at the inception of the All-American Canal Contract. This state jurisdiction is intended *by federal law* to be used and respected in the reclamation scheme of things. The Court of Appeals' failure to accord that respect repudiates the rules laid down by this *Court in California v. United States,* 438 U.S. 645 (1978). Respondents' memorandum does not even mention *Hewes v. All Persons.* It does cite *California v. United States,* but in doing so, it, first, creates, and then, addresses a question not raised in any of the petitions for certiorari. [footnote continues on next page]

"new material" however, and this in a misleading fashion. Rule 24 (4-5). Specifically, the Opposition Memorandum implies that Congress is on the verge of mooting this case by enacting legislation to reverse the effect of the Ninth Circuit's decision. (Opposition Memo pp. 14-16.) While legislation is pending, it does not in any way moot the crucial *legal* issues raised in the landowners' petition.[2]

The currently-pending bill to which the Opposition Memorandum apparently intends to refer does not, as perhaps suggested, deal principally with Imperial Valley. It entails a significant reconsideration of many provisions of the reclamation program. S. 14[3]

Although S. 14 has passed the Senate, the House has not acted on it, or any similar proposal. On November 13, 1979, the Chairman of the House Interior Committee, Congressman Udall, stated publicly that, in his opinion, S. 14 or similar legislation would not be likely to pass in the House during this session of Congress.[4]

In view of respondents' position, it is perhaps noteworthy that Administration representatives have urged that Congress should not act with reference to the equities in Imperial Valley on the ground that it would be desirable to have the matter settled in this Court. Thus, at the Senate hearings on S. 14 and other bills, Secretary of the Interior Andrus stated:

> "I hope the Court will speak to this Senator and we can get it resolved once and for all."[5]

There are strong equities and public interests in favor of legislative action to reverse the decision below if it is left standing. Nevertheless, Congress is occupied with many subjects, and the legislative process is uncertain. Clearly it is not likely that legislation will in any way moot the practical effect of the Ninth Circuit's decision during this session of Congress. Further, even if corrective legislation is obtained at some future date, that legislation would not correct the serious distortions of federal law and practice sponsored by the opinion below.

For these reasons, and for the reasons expressed in the Petition for Writ of Certiorari filed by the landowner parties, petitioners again pray that a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit in this important case.

November 16, 1979

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[footnote 1, continued]

The petition shows that the decision below mandates an abrogation of this Court's mandate in *Arizona v. California*. The memorandum does not answer that question, it simply asserts that "neither Secretary Wilbur nor Executive Assistant Ely considered 'present perfected rights' to be relevant. Since the documents referred to predate *Arizona v. California* by four decades, they can have no bearing on the fundamental issue raised in its petition.

Similarly, the petition shows that the Ninth Circuit's decision is internally contradictory on the issue of standing, and that it flatly contradicts this Court's holding in *Warth v. Seldin*, 422 U.S. 490 (1970). The Memorandum in Opposition does not deign to mention standing.

2. It is noteworthy that respondent cites a bill introduced in 1978, not the currently-pending bills. (Opposition Memo. pp. 15-16.)

3. S. 14 is one of more than a dozen bills in the hopper which deal, in one way or another, with land — limitation provisions of the reclamation law. S. 14 is the only one which has made significant progress in Congress, having passed the Senate.

H.R. 2994 deals only with Imperial Valley, but no action has been taken on this bill.

4. Los Angeles *Times*, November 14, 1979, Pt. I, p. 26, col. 4.

5. *Proposed Reclamation Reform Act of 1979:* Hearings on S. 14, S. 386, S. 633, S. 654, S. 672, S. 718 and S. 735, Subcomm on Energy Research and Development, Sen. Comm on Energy and Natural Resources, 96th Cong. 1st Sess. P. 277 (1979).

At the House hearings on November 13, Secretary Andrus repeated these sentiments, suggesting that this Court is the best place to resolve the issue and not the legislature. See, *Hearings on Reclamation Reform*, Subcomm on Water and Power Resources, House Comm on Irrigation and Insular Affairs, 96th Cong., 1st Sess., pp. 25, 55 (Unofficial Tr., 1979). [The official transcript of these hearings is not yet available. The transcript cited is subject to editorial revision].

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

Nos. 79-421, 79-425 and 79-435

JOHN M. BRYANT, et al.,
Petitioners,
vs.
BEN YELLEN, et al.,
Respondents.

STATE OF CALIFORNIA, et al.,
Petitioners,
vs.
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IMPERIAL IRRIGATION DISTRICT, et al.,
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RESPONDENTS' RESPONSE TO REPLY BRIEF OF BRYANT PETITIONERS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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In the Memorandum in Opposition to the pending petitions, respondents did not consider it necessary to reiterate the conclusions or reasoning of the Court of Appeals. The two opinions of the panel speak for themselves and require little supplemental explanation.

In their Reply Brief, the Bryant petitioners persist in their efforts to manufacture a conflict between the panel's decision on present perfected rights and this Court's decrees in *Arizona v. California*. In doing so, the Bryant petitioners have made an error which respondents wish to bring to the attention of the Court.

In the Memorandum in Opposition, respondents pointed out that neither Secretary Wilbur nor his Executive Assistant Northcutt Ely considered the subject of present perfected rights to be relevant to their consideration of the applicability of the 160 acre limitation to the Imperial Valley. If there was any merit to the argument, presumably those charged with the contemporaneous construction of the Project Act at the time of its adoption would have considered it. In their Reply Brief, the Bryant petitioners suggest that the failure of the Secretary and his Executive Assistant to consider the question of present perfected rights would "have no bearing on the fundamental issue" raised in the present petitions because the documents prepared by Messrs. Wilbur and Ely "predate *Arizona v. California* by four decades". (Reply Br. 2.)

Although the Bryant petitioners imply that present perfected rights have their source in the decrees of this Court, the fact of the matter is that present perfected rights have their origin in Article VIII of the Colorado River compact. (Reproduced in Dist. App. 168a).

The Colorado River compact is part of the Project Act by reason of Section 13a thereof, 43 U.S.C. § 617*l*.

> The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article II of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the Legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

The Project Act became effective on June 25, 1929 by Presidential Proclamation (46 Stat. 3000 [1929]), after six states, including California, had ratified the compact and the California legislature accepted the limitation of 4,400,000 acre feet of water per year. *California v. Arizona*, 373 U.S. 546, 558 (1963).

If the concept of present perfected rights had even the remotest possibility of being in conflict with the anti-monopoly provisions of reclamation law, that conflict would certainly have been considered by the Secretary of Interior in 1933 and his Executive Assistant in 1930. This Court did not create the legislative policy of protecting present perfected rights "four decades" later. That policy was present in the statute itself in 1929, when the Project Act became effective. There were no records of individual water rights in the Imperial Valley as of the effective date of the Project Act, and "four decades" later no indi-

vidual landowner has filed a claim to water under the terms of this Court's decree in *Arizona v. California.* (559 F.2d at 528-29, Dist.App.32a) Petitioners' makeweight had no more relevance four decades ago than it has today.

Dated: November 23, 1979, San Francisco, California.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

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STATE OF CALIFORNIA, *et al.*,

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BEN YELLEN, *et al.*,

Respondents.

BRIEF OF PETITIONER STATE OF CALIFORNIA

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BRIEF OF PETITIONER STATE OF CALIFORNIA

Opinions Below

The decision of the United States Court of Appeals is reported at 559 F.2d 509 (9th Cir. 1977). A subsequent decision, modifying the first decision and denying petitions for rehearing, is reported at 595 F.2d 524 (9th Cir. 1979). The decision of the District Court is reported at 322 F.Supp. 11 (S.D.Cal. 1971). All these decisions were reproduced in the Appendix to Petition for Writ of Certiorari filed by Imperial Irrigation District in this same case (pp. 1a-61a, 64a-111a).

Jurisdiction

The decision of the United States Court of Appeals was rendered on August 18, 1977. That decision was subsequently modified by an order entered April 23, 1979, which denied the State of California's petition for rehearing. On July 18, 1979, Justice Stevens granted

an extension of time to and including September 14, 1979, within which to file a petition for writ of certiorari. Jurisdiction of the Supreme Court was invoked under 28 U.S.C. § 1254(1). The Supreme Court granted California's petition for writ of certiorari on December 3, 1979.

Questions Presented

The State of California associates itself with the petitions for writ of certiorari and briefs filed by John Bryant, *et al.* (the landowners) and by the Imperial Irrigation District. The State generally joins in the questions presented and the arguments made in those petitions and briefs. For its own part, however, the State raises just one question.

Should a long-standing administrative interpretation that the acreage limitation of federal reclamation law does not apply to privately-owned lands within the Imperial Irrigation District be overturned by a court even though such interpretation was reasonable and was relied upon for over thirty years by persons within its ambit?

Federal Laws Involved

This case involves the following provisions: Article VIII of the Colorado River Compact; Sections 3 and 5 of the Reclamation Act of 1902 (43 U.S. Code §§ 434, 431); Section 46 of the Reclamation Act of 1926 (43 U.S. Code § 423e); and Sections 1, 6, 8, 9, 13, and 14 of the Boulder Canyon Project Act (43 U.S. Code §§ 617, 617e, 617g, 617h, 617*l*, 617m). All these provisions were reproduced in the Appendix to Petition for Writ of Certiorari filed by Imperial Irrigation District (pp. 155a-168a, 172a-175a).

Statement of the Case

The central question of this case is whether the 160-acre limitation of federal reclamation law applies to privately-owned lands within the Imperial Irrigation District which are being irrigated with water provided by the federal government pursuant to the Boulder Canyon Project Act of 1928.

1. Facts of the Case

The State of California does not propose an exhaustive review of the facts already covered in the petitions and briefs filed by John Bryant, *et al.* and by Imperial Irrigation District. However, the State does wish to highlight certain facts particularly relevant to its argument.

In his letter of February 24, 1933, to the Imperial Irrigation District, Secretary of the Interior Wilbur stated, in part, as follows:

> "Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

"In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. . . ." (Reproduced in the Appendix to Petition for Writ of Certiorari filed by Imperial Irrigation District).

There is no question that from the date of the Wilbur letter in 1933 up through 1964, the administrative practice of not applying acreage limitations to the Imperial Valley never varied. The Department of the Interior made no attempt to apply the acreage limitation in the Imperial Valley during that 31 years, a fact testified to by a major Government witness. (Rep. Tr. pp. 145, 191, 328, 332.)

There is also no question that many people in the Imperial Valley relied on the Wilbur ruling in investing in land, improvements, and equipment during the 1933-64 period. In 1933, 213,000 acres, or 46.6 percent of the farmland in the Imperial Irrigation District, was farmed in units exceeding 180 acres. In 1959, 456,000 acres, or 91.5 percent of the total farmland, was farmed in units exceeding 180 acres. (Rec. on App., Vol. II, p. 20.) So during part of the 1933-64 period, the amount of land farmed well in excess of the 160-acre limitation more than doubled.

Eight long-time landowners from various parts of the Imperial Valley testified as to their investment in land in excess of 160 acres, improvements, and equipment during the 1933-64 period. All made their investments in reliance on the nonapplicability of the 160-acre limitation to the Imperial Valley. (Rep. Tr. pp. 287, 290, 318-19, 343-50, 358-63, 369-70, 373-75, 384-89, 393-97, 401-05, 418-23.)

2. Nature of the Case and Prior Proceedings

The United States of America filed the complaint in this case against the Imperial Irrigation District on January 11, 1967, in the United States District Court for the Southern District of California, invoking jurisdiction under 28 U.S. Code § 1345. The United States asked that the Imperial Irrigation District be adjudged to be bound to the 160-acre limitation of reclamation law in the delivery of Colorado River water to all privately-owned lands within the Imperial Irrigation District. Thereafter, a group of Imperial Valley landowners (John Bryant, *et al.*) and the State of California were allowed to intervene as defendants. After trial in December 1970, the court issued a memorandum decision on January 5, 1971, holding in favor of the defendants.

The United States of America did not appeal but respondents Ben Yellen, *et al.*, moved to intervene for purposes of appeal. On March 29, 1971, the District Court denied this motion and on April 2, 1971, appellants appealed that denial to the United

States Court of Appeals for the Ninth Circuit. On August 6, 1973, the Court of Appeals reversed the District Court denial and allowed appellants to intervene for purposes of appeal. The Court of Appeals further ordered this case to be argued together with the case of *Yellen v. Hickel,* which involves the residence requirement of federal reclamation law vis-a-vis privately-owned lands in the Imperial Irrigation District. However, the State of California is not a party to that case.

On August 18, 1977, the Court of Appeals issued its decision, holding in the present case that the acreage limitation does apply and thus reversing the judgment of the District Court. John Bryant, *et al.,* Imperial Irrigation District, and the State of California all filed petitions for rehearing in September 1977. The State's petition also requested modification of the court's judgment. On April 23, 1979, the Court of Appeals issued a further decision denying all petitions for rehearing but modifying its judgment as requested by the State. The State's petition for writ of certiorari followed that decision.

ARGUMENT

The Court of Appeals' Decision Casts Strong Doubt on the Ability of Persons Seeking the Interpretation by a Government Agency of the Very Laws It Is Required to Apply and Enforce to Rely on Such Interpretation

The State of California contends, as it has in the lower proceedings, that this case need not be decided on the basis of whether the Boulder Canyon Project Act made the 160-acre limitation applicable to privately-owned lands within the Imperial Irrigation District. Instead, the case can and should be decided on a narrower ground. Secretary of the Interior Wilbur concluded, in his 1933 letter to the Imperial Irrigation District, that the acreage limitation was not applicable. If this was a *reasonable* interpretation of the Project Act, then as an administrative determination of long standing, relied upon by a substantial number of people, it should not be overturned by a court. The issue should be whether the Wilbur conclusion was a reasonable interpretation, not whether it was the correct one. Unless it were unreasonable and plainly wrong, it should be upheld, and the acreage limitation should not be applied within the District.

The Court of Appeals concludes that the acreage limitation does apply and also apparently that Secretary Wilbur could not have reasonably concluded otherwise. The State of California fails to see how the court could so hold and could so overlook the basic fairness issue inherent in our argument. If the present decision stands, no one seeking the interpretation by a government agency of the very laws it is required to apply and enforce will be able to confidently rely on such interpretation. If government can change its mind more

than thirty years later and summarily terminate expectations of persons who have long relied on an earlier determination, then no one will be able to count on such administrative interpretations. Such a result would have detrimental implications far beyond the particulars of the present case.

A. The Test the Court Should Apply in Deciding This Case Is Whether Secretary Wilbur's Administrative Interpretation of the Boulder Canyon Project Act Was Reasonable

This Court has established that an administrative interpretation of long standing, which has been generally unchallenged, shall not be overturned unless that interpretation is wholly unreasonable.

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. . . ." *Norwegian Nitrogen Co. v. U.S.* (1933) 288 U.S. 294, 315.

Similarly, this Court has declared:

> " 'If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons.' "

> *McLaren v. Fleischer* (1921) 256 U.S. 477, 480-81, as quoted in *Udall v. Tallman* (1965) 380 U.S. 1, 18.

The Court in *Udall v. Tallman, supra* at 18, then goes on to make its decision on the basis of whether or not an interpretation by the Secretary of the Interior was reasonable.

The reasonableness principle of *Udall v. Tallman, supra*, is particularly applicable in cases where the administrative interpretation has been relied upon by a substantial number of persons within its ambit. *Logan v. Davis* (1914) 233 U.S. 613, 626-27; *Kindred v. Union Pacific R.R. Co.* (1912) 225 U.S. 582, 596; *Hewitt v. Schultz* (1901) 180 U.S. 139, 156-57; *United States v. Alabama Railroad Co.* (1892) 142 U.S. 615, 621; *United States v. Burlington etc. R.R. Co.* (1878) 98 U.S. 334, 341-42.

In the present case, there is no question that there was an administrative interpretation of federal reclamation law (the Wilbur letter) that went virtually unchallenged for 31 years and was relied upon by a substantial number of persons in the area of its effect, the Imperial Valley. This seems to be an ideal case for applying the reasonableness principle of *Udall v. Tallman, supra*, since countless citizens of the entire Imperial Valley region have acquired and developed arable lands in reliance on the government's long-standing practice of not applying the 160-acre limitation in the area.

Udall v. Tallman, supra, is but one of a line of cases giving great weight to established administrative interpretations of statutes and other government regulations. The fact that *Tallman* may be factually distin-

guishable from the present case does not render its rule of law any less applicable. Also, the fact that *Tallman* involves the interpretation of an administrative regulation rather than an act of Congress, as here, is not significant. *Tallman* incorporates language from *McLaren v. Fleischer, supra,* which specifically refers to the interpretation of acts of Congress. Furthermore, *McLaren* itself and *United States v. Alabama Railroad Co., supra,* are cases in which reasonable administrative interpretations of acts of Congress were upheld.

Finally, the *Tallman* rule can apply to protect private rights even when an alleged national policy may be involved, such as acreage limitation. *United States v. Alabama, supra,* holds that such rights acquired in reliance on long-standing administrative rulings will be protected, even against the government. In any case, the State of California believes that national policy should also be concerned with protecting persons and a region whose long-term economic development was based on reliance on long-standing government interpretation of federal reclamation law.

B. The Consistent Administrative Interpretation Was a Reasonable Interpretation of the Boulder Canyon Project Act, and as Such, Should Not Be Disturbed by the Court

The key to resolution of this matter lies in the question of whether Secretary Wilbur's 1933 interpretation of the Boulder Canyon Project Act was reasonable. The Secretary's conclusion that the acreage limitation is not applicable to privately-owned lands in Imperial Irrigation District rested on two premises: (1) that such lands have vested rights; and (2) that the Boulder Canyon Project Act does not impose limitations on lands having vested rights.

There can be no doubt that the Secretary was probably correct, but at the very least reasonable, in finding that privately owned, Imperial Valley lands had vested water rights. By paragraph 12(a) of the Stipulation of Facts (Rec. on App., Vol. II, p. 9), all parties agreed that such rights existed.[1] However, the Court of Appeals has determined that these vested (present perfected) water rights are held by the Imperial Irrigation District, not by individual landowners and thus can be used on any land within the District. But this is a dubious proposition, at best, since present perfected rights are tied to defined areas of land and presumably attach to that land irrespective of who owns it or whether it is held as excess acreage. Therefore, it appears that Secretary Wilbur was correct in his premise that privately-owned lands within the District have vested rights. At the very least, however, such a conclusion was reasonable. We thus turn to the Secretary's second premise to determine whether it was reasonable when made.

Section 1 of the Boulder Canyon Project Act provides that the Secretary of the Interior shall build a dam, and, if deemed advisable, a canal for diversion of waters from the Colorado River to Imperial Valley. The pur-

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[1]The Stipulation provides that there exists within the boundaries of the Imperial Irrigation District "present perfected rights" as that quoted phrase is construed and defined in *Arizona v. California,* 373 U.S. 546 (1963), 376 U.S. 340 (1964), 383 U.S. 268 (1966). (Rec. on App., Vol. II, p. 9.) A present perfected right is defined as a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land and existing as of June 25, 1929. *Arizona v. California* (1964) 376 U.S. 340. And this Court has subsequently recognized the existence of such rights within the District in a supplemental decree in *Arizona v. California,* .... U.S. .... (1979).

pose of the dam is, in part, for satisfaction of present perfected rights in pursuance of the Colorado River Compact. (Section 6 of the Project Act.) Water delivered through the dam and canal is to be provided to Imperial free of charge for irrigation and potable purposes. (Section 1 of the Project Act.) All water deliveries and other activities with regard to the operation and management of the dam are controlled by the Colorado River Compact. (Sections 8 and 13 of the Project Act.)

Congress was well aware that the water had been used in the Imperial Valley since 1901. It was equally well aware that the intent of the Colorado River Compact was to leave unimpaired present perfected rights. (Colorado River Compact, November 24, 1922, § VIII.) Finally, it has before it the facts that there were holdings in excess of 160 acres at the passage of the Act. In writing the Project Act with its insistence that the Colorado River Compact be the controlling guide, and that present perfected rights be honored, it would be at least reasonable to assume, as Secretary Wilbur did, that Congress intended not to interfere or restrict the delivery of water to privately-owned lands already having vested water rights.

This intent becomes manifest by a reading of Section 9 of the Project Act. That section provides that the acreage limitation shall apply to newly opened public lands in accordance with the provisions of the reclamation law. It is a reasonable conclusion that if the excess land laws are expressly made applicable to newly opened public lands, that limitation is not applicable to privately-owned lands which long since had acquired a water right. In the light of these specific directives by Congress, it is reasonable to conclude that Section

14 of the Project Act did not operate to provide an acreage limitation upon privately-owned Imperial lands. If Section 14 did incorporate and apply all previous reclamation law to Imperial lands, including thereby the prohibition against water delivery to privately-owned lands greater than 160 acres under Section 46 of the Reclamation Law of 1926, then it also incorporated the 160-acre limitation on public lands from Section 3 of the 1902 Reclamation Act. But if it were so inclusive, then the public land limitation of Section 9 of the Project Act would be mere surplusage, which we cannot reasonably assume.

Even if we assume that Section 14 of the Project Act were all-inclusive as to the reclamation law, it is very questionable whether it would operate so as to incorporate Section 46 of the 1926 Act with regard to water deliveries within the Imperial Irrigation District. Section 14 of the Project Act only provides that the reclamation law shall govern the "construction, operation, and management of the works herein authorized. . . ." It says nothing about water deliveries from these facilities. Furthermore, even if Section 14 of the Project Act were deemed to include deliveries, its entire language is still qualified by the closing phrase "except as otherwise herein provided." What is "otherwise herein provided" in the Project Act, among other things, is that present perfected rights under the Colorado River Compact be honored. Therefore, if Section 46 of the 1926 Act were to apply via Section 14 of the Project Act so as to preclude water deliveries to privately-owned Imperial farms greater than 160 acres, such application would be nullified by the "except as otherwise herein provided" language so as to honor the present perfected rights to water delivery

that existed on those 160-plus acre farms at the time of the passage of the Project Act.

The State of California contends that Secretary Wilbur's interpretation was probably correct but was, at the very least, reasonable in light of the analysis above. Further, Secretary Wilbur's ruling was one in a series of similar Department of the Interior interpretations dating back to the Umatilla Project in 1905. As Secretary Wilbur notes:

> "On many projects it has been the practice to recognize vested rights in single ownership of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project and others.
>
> ". . . .
>
> "The foregoing has been long settled by decisions of the Department and by the practice of carrying such decisions into effect." (Wilbur letter)

Certainly, 28 years of precedent is not an unreasonable basis for interpretation.

Finally, the position of the Secretary himself should be considered. Ray Lyman Wilbur was Secretary of the Interior throughout the Hoover Administration. It was his Department that would be affected by the new regional concept of water development incorporated in the Boulder Canyon Project Act. It was his Department that would build the Project, his that would operate it, his that would bear the responsibility of delivering the water from it, his that would enforce the acreage limitations if any there were. It was his

staff that testified before the Congressional committees, his staff that negotiated the contract for the All-American Canal, his staff that determined the feasibility of the canal. It was his job to supervise these operations of staff and of assuring that the Project Act was properly implemented. What we suggest is that the Secretary, with his direct personal knowledge of the facts from his unique vantage point in time and position, made a decision which was at least reasonable if not correct, and, in fact, more likely to be both than a decision promulgated 34 years after the fact. It is this concept which underlies the long recognized rules holding administrative interpretations as this to be binding save for extraordinary circumstances.

The Court of Appeals' rejection of this argument is not persuasive. The court dismisses the Wilbur letter as irrelevant because it does not explicitly address the key provision of reclamation law at issue, Section 46 of the 1926 Act. From a fairness standpoint, however, that should not matter. What is crucial is that Secretary Wilbur wrote the District and stated that the acreage limitation did not apply. He based his conclusion on the premises that the private lands involved had vested rights and that the Boulder Canyon Project Act did not impose the acreage limitation on lands having such rights. As we have shown, *supra,* a reasonable argument exists in support of this conclusion, and one which takes into account Section 46. Therefore, it cannot be said that Secretary Wilbur's interpretation was unreasonable or plainly wrong. Absent this, the reliance it engendered over more than 30 years compels its conclusion to be upheld.

The Court of Appeals also notes that the Wilbur letter was not written until after the District contracted

with the United States for water, as if this somehow negates any alleged reliance on the letter. However, as we have also noted, *supra,* many individuals subsequently, and over a period of years, relied on the Wilbur determination in investing in land, improvements, and equipment. The reliance and fairness issue in this regard is undeniable.

Finally, the Court of Appeals points out that doubts as to the legal validity of the Wilbur letter arose within the Department of the Interior long before 1964, the year in which it was officially disapproved by Solicitor Barry. However, internal disputes at Interior are simply irrelevant as long as the Wilbur letter continued to represent official Interior policy and as long as no attempt was made to enforce the acreage limitation within the Imperial Irrigation District.

The record is that the Wilbur letter engendered a reliance on the part of individual Imperial Valley landowners for a period of 31 years. Even if the Court of Appeals is correct in its interpretation of reclamation law as applied within the Imperial Irrigation District, it surely was wrong to find that Secretary Wilbur's contrary interpretation was wholly unreasonable or plainly wrong in an area where the variety of contradictory and ambiguous statutory provisions precludes a clear and unequivocal meaning. In such a case, the long-standing administrative interpretation should be upheld in the interest of fairness. Therefore, the acreage limitation should not be applied to privately-held lands within the District.

Conclusion

For the foregoing reasons, it is respectfully requested that the decision of the United States Court of Appeals be reversed.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF LANDOWNER PETITIONERS

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IN THE

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OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,

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BEN YELLEN, et al.,
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF LANDOWNER PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit to which the writ is addressed appears at 559 F.2d 509 (1977), and that court's opinion denying a petition for rehearing appears at 595 F.2d 525 (1979).

The district court's opinion on the merits, which was reversed by the Ninth Circuit, is reported at 322 F.Supp. 11 (S.D. Cal. 1971). After the district court issued its opinion and entered judgment, respondents moved for leave to intervene for purposes of prosecuting an appeal, and the

district court denied the motion by an unreported opinion and order which appear at page 101a of the appendix to the landowners' petition ("Pet. Apx.").*

The order denying intervention was reversed in an unreported decision of a separate panel of the court of appeals. That decision is printed as an appendix to the Ninth Circuit's opinion on the merits, 559 F.2d at 543.

The opinion of the Superior Court of the State of California in *Hewes v. All Persons* is set out at Pet. Apx. 105a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 18, 1977. A timely petition for rehearing was filed on September 15, 1977, and was denied on April 23, 1979. By order of July 18, 1979 petitioners' time to file a petition for writ of certiorari was extended to September 14, 1979, and the petition was filed on that date. On December 3, 1979, this Court granted the petition for certiorari.

Subject to respondents' lack of standing, this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617, *et seq.*

Reclamation Act of 1902, §§ 1, 3-5, 8, 10, 32 Stat. 338, 43 U.S.C. §§ 372, 373, 383, 391, 416, 419, 431, 432, 434, 439.

Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 43 U.S.C. § 423e.

Reclamation Extension Act of 1914, 38 Stat. 686, 43 U.S.C. § 418.

Colorado River Compact, 70 *Cong. Rec.* 324 (1928).

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* As noted, "Pet. Apx." refers to the appendix to the landowners' petition in No. 79-421. "Con. Apx." refers to the consolidated appendix to the briefs in Nos. 79-421, 79-425, and 79-435.

California Irrigation District Act of 1897, § 68, 1897 Cal. Stat. 254, 276.

California Irrigation District Act of 1917, § 3, 1917 Cal. Stat. 243, 245.

28 U.S.C. § 1738.

QUESTIONS PRESENTED

1. Whether the court of appeals committed error by reversing a reasonable administrative interpretation of the Boulder Canyon Project Act which had been consistently followed for nearly 50 years?

2. Whether the court of appeals' denial of full faith and credit to the *in rem* judgment of the California court in *Hewes v. All Persons* contravenes federal law requiring that such credit be given to state judgments, as well as principles of comity and federalism required by this Court's decision in *California v. United States,* 438 U.S. 465 (1978)?

3. Whether respondents lack standing to intervene after judgment and perpetuate an action abandoned by the United States?

STATEMENT OF THE CASE

Petitioners. Petitioners are family farmers whose careers reflect the fact that from 1901 to the present, no acreage limitation has ever been applied to Imperial Irrigation District. Each petitioner has a personal interest in more than 160 acres of irrigable farm land which will be denied water if the judgment of the Ninth Circuit is affirmed. Each lives with his family and farms in the Imperial Valley. Petitioners were permitted to intervene as representatives of the class of persons who, like them, own lands in excess of 160 acres in a single ownership.

Respondents. This action was originally filed by the United States. After a full trial, the district court rejected the Government's position; Solicitor General Griswold thereupon determined that the judgment of the trial court was correct and should not be appealed. 117 *Cong. Rec.* 46228.

Respondents then sought leave to intervene for purposes of taking an appeal. Leave was denied by the district court, but this order was reversed by the Ninth Circuit.

Respondents are a group of individuals led by Ben Yellen, a physician from Brawley. They include a farm labor contractor and 121 farm workers. Of this group, ten filed brief affidavits averring an abstract, generalized desire to purchase farm land in the Imperial Valley. II-CR 53-54.[1]

Proceedings Below. This action was commenced by the United States on January 11, 1967. The complaint was filed against the Imperial Irrigation District (the "District"), which delivers Colorado River water to 424,000 acres of farms in the Imperial Valley of California. The Government sought a declaratory judgment that the District is subject to provisions in federal reclamation statutes which prohibit delivery of irrigation water to lands in excess of 160 acres in single ownership.

Petitioners were granted leave to intervene as defendants both individually and as class representatives. I-CR 12. The State of California was allowed to intervene as a defendant *parens patriae* and as an owner of land within the District. II-CR 1.

On January 5, 1971, after a full trial, the district court ruled for defendants. Judgment was entered on February 9, 1971. I-CR 125. On March 18, 1971, respondents moved to intervene to prosecute an appeal. II-CR 47.

On March 29, 1971, the trial court denied respondents' motion to intervene (Pet. Apx. 101a), and on April 5, 1971, respondents appealed from the order denying intervention and filed a protective notice of appeal from the judgment on the merits. I-CR 205.

On August 6, 1973, a panel of the Ninth Circuit reversed the trial court's order denying respondents the right to

1. "CR" indicates the clerk's record in the court of appeals. References to "LX-" indicate exhibits introduced by petitioners in the district court. "Pl. Ex." refers to exhibits introduced by the Government at trial.

intervene in this case.[2] Subsequently, a separate panel of the court of appeals heard argument on the merits, and on August 18, 1977, that panel issued its principal decision. Although vacating the judgment in a parallel case on the ground that respondents lacked standing to sue, the panel held that respondents have standing in this case. The panel did not separately consider whether intervention had been improvidently granted by the order of the 1973 panel, nor whether Rule 24 had been satisfied by repsondents' showing in the trial court.

Petitions for rehearing and suggestions for rehearing *en banc* were timely filed by all defendants, but these were denied on April 23, 1979.

HISTORY OF THE DISPUTE

Early Irrigation History of Imperial Valley. Imperial Valley is all of that low-lying desert generally occupying the southeast corner of California. Because the surface area of the Valley is below sea level, irrigation is possible by gravity flow from the Colorado River. In the 1890's, a group of Californians initiated appropriations of water on the river in accordance with state and federal law, and in early 1900, they commenced digging a diversion canal, partly in Mexico and partly in the United States. For much of its length, the canal followed the course of a dry river bed known as the Alamo River; hence the canal came to be known as the Alamo Canal. Water diversions were commenced through the Alamo Canal in July 1901. These irrigation efforts were financed entirely by private funds.

The bringing of water to the Imperial Valley led to unprecedented settlement and development. Within eight months settlers had built 400 miles of main and lateral canals, and by the fall of 1903 there were 5,000 residents in the Valley cultivating 100,000 acres of irrigated land. II-CR 13. In the succeeding decade the settlers organized Imperial County, formed the Imperial Irrigation District, and established ten towns.[3] Virtually the entire area of the

2. For a more extensive description of the procedural history of respondents' intervention, *see* fn. 46 at p. 65, *infra*.

3. *Report of the All-American Canal Board,* Pl. Ex. 59, pp. 11-12. A map of the District as it exists today is attached at the back of this brief. LX-DJ. That map identifies the lands owned by the individual petitioners.

Valley irrigable by gravity flow was converted into family farms by homesteaders.[4] By 1920 there were 43,453 residents in the Valley, and 414,720 acres were under irrigation. II-CR 23.

The General Reclamation Laws. On June 17, 1902, Congress passed the National Reclamation Act. 32 Stat. 388 *et seq.* The Act was intended to promote settlement of the arid regions of the West, a goal which its supporters described as the development of "homes out of territory of the United States now practically uninhabited." 35 *Cong. Rec.* 6774. Thus, Congress hoped to enable other areas in the West to achieve, with federal assistance, what was then being accomplished through private effort in Imperial Valley. The 1902 Act contemplated that the Government would appropriate water and develop water distribution systems, and that it would then sell water rights to individual settlers at cost to be repaid in ten annual installments. The Act was conceived to function in tandem with the homestead laws, applying primarily to public lands, but it also provided for the sale of water for arid lands already in private ownership. Section 5 of the Act provided that no water right should be sold for land in excess of 160 acres in private ownership.

From time to time after 1902, additonal legislation was passed to supplement and perfect the mechanics of federal reclamation. In major part, the continuing amendment and supplementation of the general reclamation program was occasioned by financial problems encountered in the operation of early projects. Settlers were commonly unable to meet thier repayment obligations to the Government, and often they lacked sufficient funds to finance the conversion of their sagebrush lands into productive farms.

In 1922, the Secretary of the Interior appointed a group of experts — known as the Fact Finders — to study the

4. These early homesteaders included the parents of petitioners Harold Brockman, Stephen Elmore, Charles Nilson and John Kubler. Brockman still lives on and farms the land his father homesteaded in 1908, Nilson still farms the homestead his father established in 1907, and John Kubler still farms the land his father homesteaded in 1916. 4 Tr. 366-75, 379-90, 398-409.

financial condition of various of the existing reclamation projects. In 1924, the Fact Finders submitted a comprehensive report which indicated that existing legislation had been unsuccessful in checking land speculation, and that land speculation had been a major cause of the unsatisfactory financial experience of many of the existing projects. *Sen. Doc. No. 92,* 68th Cong., 1st Sess. (1924). Owners of large undeveloped tracts sold them to settlers in 160-acre parcels at boom prices which reflected the future availability of water. As a result, the real settlers assumed excessive purchase money debts and ended up unable to meet their repayment obligations to the Government and unable to finance the costs of preparing their raw land for cultivation. The Fact Finders proposed that the Government could better secure repayment of its funds by contracting with irrigation districts, instead of with individual landowners, and that speculation and its adverse financial impact on settlers could be controlled by requiring owners of excess lands within a project to sell those lands to settlers at pre-project prices set by the Secretary.

Following debate on the Fact Finders' proposals in 1924, Congress enacted a bill in 1926 for "adjustment" of the financial deficiencies of existing reclamation projects. Section 46 was inserted into this legislation, adopting the Fact Finders' recommendation that irrigation district contracts be made mandatory on future reclamation projects in the general reclamation program. 44 Stat. 649. Among the detailed contract terms required in a § 46 contract was a provision that owners of lands more than 160 acres be denied water unless they had executed recordable contracts committing them to sell their excess lands at pre-project prices approved by the Secretary.

The Fact Finders and authors of § 46 anticipated that the typical project area would be "*undeveloped territory,* where there is a lack of social advantages, public improvements, roads, schools, churches and amusements, where taxes are high and the neighborhood conditions are unknown."[5] Thus, while it was certainly expected that pri-

5. *Twenty-Third Annual Report of the Bureau of Reclamation,* p. 6 (June 30, 1924). Here and elsewhere emphasis is supplied unless otherwise noted.

vate lands would be included in future general reclamation projects, these were expected to be "unimproved desert land" held by speculators "who did not intend to cultivate it." *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 56, 346 (1924). Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, described the typical excess parcel as "a piece of sagebrush land on which the owners never put one dollar of money or an hour's labor, apart from the original price of $5 per acre" and which, absent divestiture requirements, would be "sold for $200 to the man that is going to clear off the sagebrush." *Id.* at 55. Aimed at these conditions, § 46's overriding purpose was to deny the speculator his $195 profit per acre (*id.* at 55-56), and thereby assure that the settlers who bought the land and cleared off the sagebrush would be on a sound enough financial footing to secure "early conversion of *arid* excess lands from their *preproject dryfarm conditions* to productivity under irrigated agriculture."[6]

The Boulder Canyon Project Act. The problems and conditions studied by the Fact Finders and addressed by § 46 were not the problems and conditions prevailing in Imperial Valley in the early 1920's. In the Valley full settlement and development had been achieved, financially successful farming was flourishing and ten towns were prospering. The Valley's farms were incredibly productive, having an annual output that dwarfed that of any of the projects developed under the reclamation program.[7] In Congress, the Valley was described as a "garden spot" and "wonderful piece of territory . . . . as productive as any place in the United States." 69 *Cong. Rec.* 7626. The problem in the

6. *Acreage Limitation Policy,* Study for Sen. Comm. on Int. and Insular Affairs, 88th Cong., 1st Sess., p. 94 (1964).

7. The Valley's farms had an annual crop value of $42,000,000 in 1929. *Hearings on H.R. 5434,* House Comm. on Irr. & Recl., 79th Cong., 2d Sess., p. 286 (1946). By contrast, all of the farms on the 26 federal reclamation projects had an aggregate crop value of only $81,000,000. *Twenty-Eighth Annual Rept. of the Commissioner of Recl.,* p. 63 (June 30, 1929). *See also, Hearings on H.R. 8836,* House Comm. on Irr. and Recl., 68th Cong., 1st Sess., pp. 38, 55, 56 (1924); *Twenty-Third Annual Report of the Bureau of Reclamation,* pp. 1-4 (June 30, 1924).

Valley was not a need to stimulate settlement and development; the problem was a need to protect an already existing and highly successful farm community from the threat of floods and from international difficulties which resulted from use of a diversion canal which was located partly in Mexico.

In 1905, the Colorado had breached its channel and, following the Alamo Canal, had flooded the Imperial Valley. This breach was closed in 1907, but keeping it closed in subsequent seasons required constant expenditure and engineering work, much of this work in Mexico. Another problem was Mexican appropriation of waters flowing in the Alamo Canal. These appropriations created a threat that priorities would arise in Mexico, even though no material part of the Colorado's flow originated in that country. This was a serious threat to future expanded use of the river's waters in the Upper Basin States. These and other difficulties generated hopes that a canal could be constructed entirely within the United States.

In 1919 the Department of The Interior and Imperial Irrigation District contracted to study the possibility of an all-American canal. This study indicated that the investment in any such canal would be continually jeopardized by flood so long as the Colorado remained unregulated. Given the need for a dam to regulate flow, the possibility of storage for the benefit of both Upper Basin states and existing appropriators in the Lower Basin followed naturally. *Report of the All-American Canal Board,* pp. 21-24; Pl. Ex. 59. Congress directed investigation of such a project. 41 Stat. 600. This resulted in publication of the Fall-Davis Report in 1922, recommending that the federal government construct not only an all-American canal, but also a dam and storage reservoir at Boulder Canyon. *S. Doc. No. 142,* 67th Cong., 2d Sess. (1922).

Given the prospect of a national project on the Colorado, the seven states located in the river's basin were granted congressional consent to negotiate a compact for the "equitable division and apportionment . . . of water supply of the Colorado River." 42 Stat. 171. After a year of negotiations, the states were able to reach an agreement, entered November 24, 1922, which provided for an alloca-

tion of the flow of the mainstream as between states in the Upper Basin and those in the Lower Basin. 70 *Cong. Rec.* 324 (1928).

During the last negotiating session of the Compact Commission, representatives of Imperial Valley testified to concern that their existing water rights might be impaired any way by the inter-basin allocation. In response to their request, and recognizing that the farmers in Imperial Valley had been using waters from the river since 1901, the Commission included Article VIII in the Compact,[8] guaranteeing that "present perfected rights" would be unimpaired. Pet. Apx., p. 162a.

Beginning in 1922 and continuing through 1928, Congressman Phil Swing, the Representative from the Imperial Valley, and Senator Hiram Johnson of California offered bills in each session of Congress providing for construction of a dam on the Colorado and of an all-American canal. The last of the Swing-Johnson bills was enacted as the Boulder Canyon Project Act in December 1928. 45 Stat. 1057. In addition to authorizing the engineering measures recommended in the Fall-Davis Report, the statute created a method for "a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters." *Arizona v. California,* 373 U.S. 546, 560 (1963). That apportionment system includes an explicit mandate in § 6 of the Act for the "satisfaction of present perfected rights in pursuance of Article VIII of . . . [the] Colorado River Compact. . . ." 43 U.S.C. § 617e.

The Boulder Canyon Project Act because of its unique objects and legislative history, is unlike any of the general reclamation statutes that preceded or followed it. Likewise, Imperial Irrigation District in 1928 was not the type of situation for which the prior reclamation laws had been designed. At the time the Project Act took effect, irrigation development and settlement in Imperial Valley was virtually complete. The District then operated a fully-developed distribution system consisting of 1,700 miles of

8. *See, Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. and Recl. 69th Cong., 1st Sess. 678 (1925); LX-DD(C).

main and lateral canals (compared with approximately 1,650 miles of canals operated today). II-CR 15. Its farmers were irrigating more than 424,000 acres, some 13,000 less than today (II-CR 23-24), and the population of the Valley was 61,000 people. Congress' purpose was to protect this flourishing farm community, not break it up.[9]

The All-American Canal Contract. Subsequent to passage of the Project Act the Department of The Interior entered into negotiations with the District to settle the terms on which the All-American Canal would be constructed and paid for, and water be delivered to the District in satisfaction of its present perfected rights. Early in the negotiations, the question of whether the Project Act made acreage limitation laws applicable to the District was considered, it being recognized that if applicable, § 46 of the 1926 Act would require inclusion in the contract of elaborate acreage limitation provisions. After due consideration, the Department concluded that acreage limitation was not applicable to Imperial Valley under the terms of the Project Act, and from that point forward, beginning in 1930, provisions relating to acreage limitation were intentionally omitted from the draft contract. LX-AR.

Ultimately, on December 1, 1932, the All-American Canal Contract was executed pursuant to §§ 1, 4(b) and 5 of the Project Act. This contract was approved by the District's Board of Directors, and then, as required by state law, the contract was submitted to the voters of the District for approval at a general election. On January 16, 1933, the contract, without acreage limitation provisions, was approved by the District's electors by a margin of 4,947 to 729.

9. "The paramount purpose of this legislation is the protection of human life and property in Imperial Valley . . . [and] other areas in the lower Colorado. . . ." *H. Rep. No. 918,* 70th Cong., 1st Sess. 2 (1928). "In order to protect the properties in the Imperial Valley against possible inundation . . . it is really the duty of the Government to proceed to build the All-American Canal even if no additional lands were contemplated to be put under cultivation." *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 35 (1926).

Hewes v. All Persons. California's Irrigation District Law, as well as Article 31 of the Contract, required the District to bring an action to confirm the validity of the contract. This action was commenced in the Superior Court for Imperial County under the caption *Hewes v. All Persons*. Charles T. Malan, an owner of 210 acres in the District, contested the validity of the contract on the ground that the reclamation law required imposition of the 160-acre limitation which would unlawfully deprive him of water rights he had been exercising for twenty years. LX-AT, pp. 8-9. Malan was represented by counsel and vigorously prosecuted his claims. LX-AF, BF. The District denied the applicability of the 160-acre limitation law, but conceded that if such law were applicable, the contract would be invalid. LX-BK, p. 19.

On February 24, 1933, in specific response to Malan's allegations in *Hewes,* Ray Lyman Wilbur,[10] Secretary of the Interior, wrote a public letter to the District confirming the Department's intentional omission of any acreage limitation from the contract on the ground that the Boulder Canyon Project Act does not make the land limitation provision of § 5 of the Reclamation Act of 1902 applicable to privately-owned lands in the District. LX-AO, Con. Apx. 176a. Seven days later, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, Porter W. Dent,[11] issued a letter confirming that the Department's interpretation likewise applied to § 46 of the 1926 Act. LX-AR, Con. Apx. 179a. In addition to the issuance of these letters, Dr.

10. Wilbur was President of Stanford University from 1916 to 1943, and Chancellor of the University from 1943 until his death in 1946. He served as Secretary of the Interior from 1929 to 1933, while on leave of absence from Stanford.

11. Porter Dent had directed preparation of the then leading publication on the reclamation laws. United States Department of the Interior, *Federal Reclamation Laws* (1931). Dent was a career government attorney. He had been an Assistant United States Attorney, assigned to the Land Claims Court, and then was a District Counsel for the Bureau of Reclamation. When Dr. Elwood Mead became Commissioner of Reclamation in 1924, Dent was appointed Assistant to the Commissioner. He served in that position until 1927, when he became Assistant Commissioner and Chief Counsel of the Bureau of Reclamation.

Elwood Mead,[12] Commissioner of the Bureau of Reclamation, arranged for government counsel to assist the District in responding to Malan's allegations concerning the 160-acre limitation. LX-AQ.

On July 1, 1933, following the Wilbur ruling, the California court entered judgment in *Hewes* confirming the validity and legality of the contract. LX-BC. The court met Malan's objections by concluding that "§ 5 of the Reclamation Law does not apply" under the terms of the Project Act to lands in the Imperial Irrigation District, and that nothing in the "contract or . . . any law applicable thereto . . . [restricts] the delivery of water to any maximum acreage of land in a single ownership." Pet. Apx. 124a-125a; LX-BC, p. 32.

The Department of the Interior monitored the progress of *Hewes* closely. Under § 4(b) of the Project Act the Secretary was required to make provision for repayment of the cost of the All-American Canal "before any money is appropriated." The Comptroller General in the new Roosevelt administration ruled that this required that the validation judgment on the All-American Canal contract be final before any appropriations could be sought for construction of the canal. LX-BH. Malan prolonged the litigation, first by unsuccessfully seeking a new trial (LX-BF), and then by appealing. In an effort to seek administrative relief, Malan's counsel wrote Secretary Ickes, calling his attention to the reasons for Malan's claim that the contract was illegal, including the acreage limitation issue. LX-BK, p. 1 and attachment at pp. 18-19. Ultimately Malan dismissed his appeal, and the judgment in *Hewes* became final on February 26, 1934. LX-BL. The contract

12. Dr. Mead had been a principal witness before Congress during the hearings on the 1902 Reclamation Act. Prior to becoming Commissioner of the Bureau of Reclamation, he had served as Chief of Irrigation Investigation for the Department of Agriculture and had taught as a professor of rural institutions and irrigation at the University of California at Berkeley. Mead was a member of the All-American Canal Board in 1918-19. He served as Commissioner of Reclamation from 1924 until his death in 1936. Lake Mead, the storage reservoir for Hoover Dam, honors his contribution as one of the principal architects of the Boulder Canyon Project.

was then submitted to Congress and appropriations issued during the succeeding years for construction of the Canal.

Administrative Practice as to Acreage Limitation. Construction of the All-American Canal commenced in August 1934. The first deliveries of water through the canal were made in 1940. In 1942, the District ceased using the Alamo Canal, and in 1960 it relinquished its Mexican concession to operate that facility.

In 1941, before closing of the Alamo Canal, the Wilbur ruling was analyzed in a study of the excess land laws conducted within the Bureau of Reclamation. That study concluded that the Project Act did not make acreage limitation applicable in Imperial Valley. LX-BO, App., p. 4. In 1942, the Federal Land Bank asked the Bureau of Reclamation whether loans it was making on farmlands in the District might be jeopardized by possible application of acreage limitations. Commissioner Page responded for the Bureau, advising the Land Bank that it was the opinion of the Bureau, consistent with the 1933 Wilbur ruling and the decision in *Hewes v. All Persons,* that acreage limitations were not applicable to privately owned lands in the District. LX-BR. The General Counsel of the Farm Credit Administration concurred in that opinion. LX-BZ, LX-CA.

In the mid-1940's, a historic congressional debate over acreage limitation policy arose in connection with the Central Valley Project in California.[13] The debate had the effect of polarizing the Government's position on acreage limitation, and no doubt has tended to distort some of the perception of earlier history. Nonetheless, even during these years, the Department adhered to the Wilbur ruling on the Imperial Valley and openly explained it to Congress.

13. The Central Valley is several hundred miles north of the Imperial Valley. The Central Valley Project involved the development of new water sources in the Sierra Mountains, and new distribution systems to irrigate farmlands in California's San Joaquin Valley. *See, Ivanhoe Irr. Dist. v. All Parties,* 47 Cal.2d 597, 614-19, 653-54; 306 P.2d 824, 833-36, 858 (1957).

In 1944, for example, in Senate hearings on acreage limitation, Assistant Reclamation Commissioner Warne explained the Department's interpretation of the Project Act and introduced a copy of the Wilbur letter into the record. *Hearings on H.R. 3961,* Subcomm. of Sen. Comm. on Commerce, 78th Cong., 2d Sess., Part IV, 599, 764-65 (1944); Con. Apx. 229a.

In 1945, Solicitor Fowler Harper of the Department of The Interior issued an opinion concerning inclusion of acreage limitation provisions in a proposed repayment contract for construction by the Bureau of Reclamation of an irrigation distribution system to serve the Coachella Valley. He concluded that the acreage limitation laws should be applied in Coachella. M-33902, 71 I.D. at 533, *et seq.* Harper acknowledged the contrary rule prevailing in the Imperial Valley and did not purport to overrule it.[14]

In 1945 and 1947, congressional debates over acreage limitation policy continued, and during those debates Harper's opinion was not cited as casting any doubt on the validity of the Wilbur ruling. The Bureau compiled an exhaustive survey of landownership in federal projects,

14. The United States had undertaken construction of the Coachella branch of the All-American Canal pursuant to a contract with the Coachella Valley County Water District dated October 15, 1934. That contract did not contain acreage limitation provisions. The contract which was the subject of Harper's opinion was a separate agreement executed in 1947 (Pl. Ex. 10) and unlike the Imperial Irrigation District contract, its purpose was to provide for construction of an irrigation distribution system for Coachella. Pl. Ex. 12. The farmers in the Coachella Valley had no pre-existing rights to water from the Colorado River. As was noted by Commissioner Bashore,

> ". . . the lands in the Coachella District are, in very large part, as yet not irrigated, and . . . those which have been irrigated have not been irrigated by the diversion and delivery of waters from the Colorado River. The proposed works will not only be a new means of getting water to the Coachella lands, but will also bring to those lands a new water supply. The factual situation of the Coachella lands seems to take them out from under the ruling of Secretary Wilbur." Pl. Ex. 13, p. 3.

which was issued to congressional committees involved in the acreage limitation debates,[15] and that study noted that the 257,949 acres held in excess of 160-acre ownerships in Imperial Valley were not "excess" since the acreage limitation laws were inapplicable in the Valley "in accordance with the ruling by the Secretary, February 24, 1933". LX-CT, pp. 17 n.6, 19 n.6. Secretary Wilbur's ruling and the inapplicability of acreage limitations in Imperial Valley were discussed in the hearings, and no objection was voiced as to the Department's position. *Hearings on S. 912,* Before a Subcomm. of the Sen. Comm. on Public Lands, 80th Cong.. 1st Sess. 159-160, 162, 166, 179, 431-32 (1947).

In 1948, the Department was requested by a veterans organization to reconsider the Wilbur ruling. Acting with the concurrence of Solicitor White (LX-BU), Secretary Krug issued a letter affirming the Department's adherence to the Wilbur ruling. LX-CR; Con. Apx. 253a. In 1949, congressional hearings on acreage limitation policy continued, and again, the practice in Imperial Valley was noted without disapproval. *Hearings on S. 1385,* 81st Cong., 1st Sess., pp. 12, 15, 50-51 (1949).

From 1947 to 1952, the Government sought changes in the All-American Canal Contract, and these were the subject of extensive negotiations between the Department and the District, which were scrutinized by Congress. During these negotiations and congressional proceedings, the Department never questioned the validity of the contract's omission of acreage limitation provisions.[16]

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15. *E.g., Hearings on Irr. and Recl.,* Before a Subcomm. of the House Comm. on Public Lands, 80th Cong., 1st Sess. 11 (1947).

16. Members of Congress were critical of the Bureau's attempt during these years to vary the terms of the All-American Canal Contract without the District's consent. *See, Hearings on H.R. 6705,* 80th Cong. 2d Sess., Part III, pp. 1775-76, 1595-1600, 1613 (1949); *Hearings on H.R. 3790,* 82nd Cong., 1st Sess., Part I, pp. 434-44, 1283-1338 (1951); 97 *Cong. Rec.* 4655-59 (1951); *Hearings on H.R. 7176,* 82nd Cong. 2d Sess., Part IV, 1652-1687 (1952). Those in the Department who then harbored doubts regarding the Wilbur ruling consciously decided not to *(Footnote continued on next page.)*

In 1958, Solicitor Bennett reaffirmed the Department's adherence to the Wilbur ruling (LX-CS), and in that same year the Wilbur letter was again discussed, without criticism, in Senate hearings on acreage limitation policy. *Hearings on S. 1425, S. 2541 and S. 3448,* 85th Cong., 2d Sess. 19, 85, App.C. at 7 and 11 (1958).

On December 31, 1964, Solicitor Frank Barry unexpectedly issued an opinion criticizing the Wilbur ruling and concluding that acreage limitation laws should have been applied to Imperial Valley in 1932. 71 I.D. 496. Notwithstanding criticism of that opinion within the Department,[17] the Department pressed for the District's concurrence with imposition of acreage limitations. The District advised that under *Hewes v. All Persons* it was precluded by law from complying with the Government's demand. Pl. Ex. 46, p. 2. Accordingly, the Government commenced this action in 1967 and vigorously prosecuted it through trial. After the district court's decision rejecting the applicability of acreage limitations, the Department of the Interior recommended against an Appeal. 117 *Cong. Rec.* 46228. Solicitor General Griswold then reviewed the case and decided that the Government should not appeal. In explanation of his decision, he stated that he had "considered the matter carefully and thoroughly . . . over a considerable period of time" and "became convinced that (a) we would not win the case in the court of appeals and (b) we should not win it." *Id.*

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raise the acreage limitation issue during negotiation of the 1952 contract amendments. As testified by the Government's chief witness at trial, former Solicitor Edward Weinberg, these individuals felt it would be "counterproductive" to propose reconsideration of acreage limitation at that time because the District "would never have signed the contract." 3 Tr. 255. *See also, id.* at 220.

17. Undersecretary Carver challenged the "legal sufficiency" of the Barry Opinion, characterized it as being "long on protestations of certitude" like a "partisan brief," and concluded that it would unjustifiably result in "almost complete disruption of a region's economy and literal confiscation of the margin of values between present units and the uneconomical pattern that would result." LX-CQ.

The People Affected by the Decision Below. Petitioners represent the people whose lives are threatened with harsh dislocation and devastating economic loss by the decision below. Each lives in the Valley and owns farmland on which he has invested the better part of his life's labor and the bulk of his life's savings. Typically, they have acquired their lands over a period of one or two decades, paying market prices which reflected whatever economic value accrued to the land from project benefits. Petitioner Robert C. Brown's situation is representative.[18] Brown

18. The following is a thumb nail summary of the trial testimony relating to the other individual petitioners:

John M. Bryant. Bryant is a rancher owning 1,120 acres near Calipatria. He came to the Valley from Northern California in 1928 and worked for a produce company through most of the depression. He began farming part-time in 1932 and purchased his first 80 acres of land in 1938. He has been a full-time farmer since 1942. He gradually accumulated the balance of his farmlands over the period 1942-1959, paying prevailing market prices. Like all petitioners and all Imperial Valley farmers, he has had to make substantial, and reoccurring, investments to keep his land productive under the high-salinity conditions prevailing in Imperial Valley. Bryant was a director of Imperial Irrigation District from 1949 through 1961. During that time, including when the All-American Canal contract was renegotiated, no suggestion was ever made to the District by any official of the federal government that acreage limitation might be applicable to Imperial Valley. 4 Tr. 415-424.

Harold Brockman. Brockman farms 1,080 acres in the Mount Signal area, which are jointly owned by him and his wife. Brockman's father homesteaded in the Valley in 1908, and was a director of the Imperial Irrigation District when the All-American Canal Contract was executed. Mr. Brockman still lives in the house in which he was born, and has continued to farm the land his father homesteaded. Brockman began farming in 1924 and in 1933 he was granted 160 acres by his father. The balance of the land owned by him and his wife was gradually acquired during the period 1938-1957. 4 Tr. 398-409.

Stephen Elmore. Steve Elmore and his wife jointly own 2,208 acres which they farm. Elmore grew up in the Valley, the son of a homesteader who began farming in the Valley in 1908. The lands owned by Elmore and his wife were acquired by them during the period 1951-1964. 4 Tr. 354-65.

Clara Marie Gutierrez. Mrs. Gutierrez owns and lives on a 515 acre farm in the Westmoreland area. She was born in the

(Footnote continued on next page.)

came to the Valley in 1942, and until 1949 worked as an employee of a sugar plant, while farming on a part-time basis. In 1949 he began farming on a full-time basis on leased lands. By 1956, he had saved enough to purchase his first 80 acre parcel. The balance of his 880-acre farm was acquired during the years 1961 and 1962. Brown bought at market prices existing 30 years after the enactment of the Project Act, and he had to incur a huge mortgage indebtedness to finance the $589,000 he paid for the land. Then he had to invest an additional $90,000 in reclamation measures,

Valley and has lived there throughout her life. She and her husband, a Basque shepherd who came to the Valley in 1928, acquired their first parcel of farm land in 1938, a spread of 80 acres on which Mrs. Gutierrez still lives. The balance of her acreage was gradually accumulated by her and her husband in small parcels they purchased in the 1940's and 1950's. 4 Tr. 390-397.

Charles Nilson. Nilson farms in the vicinity of Holtville with his brothers, Carol and Walter. The land they farm includes the 140-acre parcel which their father homesteaded in 1907 and on which the brothers grew up. Their father still owns and lives on that homestead. Of the lands farmed by the Nilson brothers, Charles and his wife own approximately 615 acres. The Nilson brothers first acquired land in their own right in 1946, purchasing 170 acres of salt-poisoned land for which they paid $15 an acre. For five years they worked to reclaim that land, plowing it to a depth of four feet to bring up fertile soil. The other lands farmed by the Nilsons were gradually acquired by them during the period 1947 to 1961. 4 Tr. 379-390.

John Kubler. Kubler, also a life-long resident of the Valley, is the son of a Swiss immigrant who moved to Imperial Valley in 1916. John began farming in the Valley in 1950, and now farms in the vicinity of Calexico on 680 acres owned by him and his wife. He inherited 130 acres from his father in 1959, and acquired the balance of his holdings over the period 1960-1967. 4 Tr. 366-75.

Kakoo Singh. Mr. Singh, who died subsequent to the trial, is survived by his wife, who is now the sole owner of their 696 acre farm in the Valley. Mr. Singh began farming in the Valley in 1914, but because of the Alien Land Laws then in effect, he and Mrs. Singh were not able to acquire their first land until 1941. They accumulated their acreage in small parcels during the period 1941-1958. LX-DK.

T. B. Shank. Mr. Shank homesteaded in the Valley in 1904, and lived on his homestead and farmed it until his death, following the trial. 3 Tr. 279-291.

$20,000 for building structures, and $175,000 for equipment, none of which is suitable for or economically feasible for use on a 160-acre farm. 4 Tr. 349-350. Like the other petitioners, Brown would be economically destroyed if he were denied water for his land and forced to sell it at an appraised price reflecting only what its value would be without water. His past life's work, his plans for the future, including retirement and his estate plans, are all threatened with harsh destruction by the decision below.

The irony of the decision below is that the human toll it threatens would be the very opposite of what § 46 of the 1926 Act was designed to achieve. The authors of § 46 envisioned that it would lead to the growth of communities in "undeveloped territory,"[19] not disruption of farm communities three-quarters of a century old. They envisioned that § 46 would force divestiture of "sagebrush land on which the owners had never put one dollar of money or one hour's labor,"[20] not force breakup of farms gradually acquired as the reward of a lifetime of active farming. The authors of § 46 envisioned sales of idle sagebrush land acquired by speculators at prices like $5 per acre;[21] they did not contemplate forced divestiture of cultivated lands owned by bona fide farmers, at appraised prices far below the investment costs of the farmer-owners. If the Project caused land speculation in Imperial Valley in the 1930's and 40's, (and there is no evidence it did), the present owners were the *victims* of that speculation, not the beneficiaries. Above all, the authors of § 46 sought to protect the farmer who "clears off the sagebrush" and "changes the raw land into a farm,"[22] not to penalize the farmer who had spent his life making the land productive.

No one has ever been able to explain how such a perversion of the vision the Congress had in the 1920's could serve the public interest, much less comport with elemental notions of fairness and decency.

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19. *Twenty-Third Annual Report of the Bureau of Reclamation,* p. 6, June 30, 1924.

20. *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 55 (1924).

21. *Id.* at 55-56.

22. *Id.* at 55, 59.

SUMMARY OF ARGUMENT

1. Statutory Construction. Section 6 of the Project Act explicitly commands the Secretary, without qualification, to satisfy present perfected rights. As emphasized by this Court in *Arizona v. California,* 373 U.S. 546, 584 (1963), Section 6 is "one of the most significant limitations" on the Secretary's power to contract for water deliveries, and is found in the Project Act because it was "a matter of intense importance to those who had reduced their water rights to actual beneficial usage at the time the Act became effective." The congressional directive to satisfy the present perfected rights in Imperial Valley, rights measured by the amount of water needed to irrigate 424,145 acres of farmland, is plainly inconsistent with implication of a congressional intention to apply acreage limitation. Such limitation would require denial of water to 233,000 of those acres. Moreover, other specific provisions of the Project Act negate any inference of intent to apply acreage limitation. These include § 1, which prohibits charging for water delivered to Imperial Valley, § 4(b) which prescribes repayment procedures inconsistent with § 46's scheme, and § 9 which provides for acreage limitation on public lands (but not on private lands).

The legislative history of the Project Act conclusively establishes that Congress did not intend acreage limitation. Congressman Swing, the Act's author, testified that the statute would not impose acreage limitation. Commissioner Mead, testified to the same effect, and the principal opponents of the legislation constantly objected that it would not impose acreage limitation Amendments proposing inclusion of statutory language to require acreage limitation were proposed in Senate Committee and during the Senate floor debates, but were never adopted. The Senate bill which became the final Act conspicuously omitted an express acreage limitation provision that had been inserted in a parallel House bill. Opponents objected to this omission, but Congress enacted the statute with the acreage limitation provision being omitted.

Were this a case of first impression, the foregoing evidence in the language of the Act and its legislative history

would compel a conclusion that Congress did not intend imposition of acreage limitation in the Valley. But whatever conclusion might be reached if this issue were being considered in 1933, the record clearly demonstrates that there is more than sufficient basis for reasoned argument and construction in support of the longstanding practice which was initiated in 1933 by those who had a contemporaneous perspective of what Congress intended. In such circumstances, and particularly where private citizens have relied on the Government's longstanding construction, it would be fundamentally unfair, injudicious and violative of this Court's decisions to construe the statute contrary to its historical interpretation.

2. **Federal Respect for State Law and State Court Judgments.** Under California law, and in other western states as well, the validity of irrigation district contracts is conditioned on three fundamental requirements: (1) approval of any proposed contract by the district's elected board of directors, (2) electoral approval of any proposed contract by a majority of the district's voters, and (3) judicial confirmation, in *in rem* proceedings, of the validity of the contract. Congress has explicitly approved and directed federal compliance with these state law procedures for irrigation district contracts. The parties to the All-American Canal Contract intentionally excluded any provision for acreage limitation, and the District's board and its electors approved that contract, not a contract with acreage limitation provisions. By setting aside what the parties to the All-American Canal Contract intended, the lower court's decision would negate the state law requirement for board and electoral approval of the District's contract obligations. Such disregard of state law denies the comity continually expressed as a requirement of federal reclamation practice. *California v. United States,* 438 U.S. 645 (1978).

The nullification of state law implicit in the lower court's decision is aggravated by the fact that it resulted from an unjustified refusal to accord *res judicata* effect to the judgment in *Hewes v. All Persons.* Both state and federal law require that confirmation judgments, such as that reached in *Hewes,* should foreclose any belated private inquiry

concerning matters legitimately within the scope of the issues adjudicated. That acreage limitation questions are within the scope of issues properly adjudicated in confirmation proceedings is established beyond question. This Court's determination of acreage limitation questions in *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958), was rendered in a confirmation proceeding brought under the identical jurisdictional statutes as *Hewes v. All Persons.* Thus, the lower court's disregard of *Hewes* violates not only the principles of federalism expounded in *California v. United States, supra,* but also the obligation, imposed upon the federal judiciary by § 1738 of the Judicial Code, to accord full faith and credit to state court judgments.

3. **Respondents' Lack of Standing.** Respondents are post-judgment intervenors who made no showing of an interest sufficient to warrant intervention under Rule 24, and who lack standing under Article III. Their alleged standing is predicated on an abstract, conclusionary assertion of a desire to purchase farmland in the Imperial Irrigation District. No showing has ever been made that if a judgment is entered in their favor, they will actually be able to purchase land. The court below did not find such ability; it simply held that it was enough that its judgment would reduce land values in Imperial Valley to some extent, regardless of whether any benefit would flow to respondents from that fact. Article III, as interpreted by this Court in *Warth v. Seldin,* 422 U.S. 490 (1975), does not permit an action to be prosecuted on such a basis. To have standing, respondents were required to show that a judgment in their favor would result in a realistic probability that they would purchase land in the Valley. They did not make this showing.

ARGUMENT

I. INTRODUCTION: THE DECISION BELOW IS WRONG IN THE FUNDAMENTAL SENSE THAT IT IS UNFAIR TO THE PEOPLE OF IMPERIAL VALLEY WHO RELIED ON THE WORD OF THE GOVERNMENT.

The arguments that take up the remainder of this brief are traditional in form and content. They deal with the interpretation of the language of the Boulder Canyon Project Act and the legislative history evidencing Congress' understanding of those provisions. They deal with the importance of the administrative construction consistently followed for 30 years prior to this action, and they deal with principles of *res judicata* and standing. Although the arguments are different, the principal basis of each of them is the same: they represent doctrines designed to insure that the law is *fair*. The decision below is erroneous because it is blatantly unfair.

The heart of this case is not a series of legal arguments — petitioners' or anyone else's. It is the indisputable fact that fifty years ago the Government interpreted the Boulder Canyon Project Act to entitle Imperial Valley farms to enjoyment of their water rights free of acreage limitation. For 50 years, ordinary people in Imperial Valley, farmers not legal scholars, relied on the Government's conduct without suspecting that one day lawyers' quibbles could overturn the premise on which their lives and their livelihoods had been built up over the years. *People* planned their careers, expended their lives' labor and invested their savings on the basis of the status quo — a status quo defined in a contract with the Government, approved in a special election, confirmed by an *in rem* judicial decree, and recognized in practice throughout the administrations of six succeeding Secretaries of the Interior and five Presidents.

The equitable claims of the farmers of the Imperial Valley have been recognized even by one of their adversaries. In contrast with the position the Government has taken in the courts, recent testimony before Congress by Secretary

Andrus acknowledged the relevance of the administrative practice:

> "I think we have to recognize that the Imperial Valley — I will use the term 'unique'. . . . It is true . . . that in early calendar year 1933 there was a letter signed by one of my predecessors which determined that the acreage limitation would not apply to Imperial Valley.
>
> ". . . .
>
> ". . . [T]he people out there have looked upon that as an assurance from the federal government . . . *whether I agree with what some of my predecessors did or not is not the important thing.*
>
> *"They did do it, and we have a certain area of responsibility in that regard. . . ."*[23]

No hint of a similar concern for fairness appears in the Ninth Circuit's opinion in this case. Yet, fairness is the central purpose of the controlling principles of statutory construction applicable to this case. As this Court has held repeatedly, fairness requires adherence to the established administrative construction, especially where citizens have innocently relied on it:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. '. . . [W]e need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n v. Aragon,* 329 U.S. 143, 153. *See also, e.g., Gray v. Powell,* 314 U.S. 402; *Universal Battery Co. v. United States,* 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its

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23. *Acreage Limitations on Bureau of Reclamation Projects,* Hearings on S. 242, S. 1812, S. 310, S. 2606 and S. 2818 before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., p. 551 (1978).

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' *Power Reactor Co. v. Electricians,* 367 U.S. 396, 408. . . ." *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

Under the rules of statutory interpretation defined in *Tallman* and in countless other decisions,[24] the duty of the courts is to uphold the validity of a longstanding administrative practice, even as against sensible criticism, if there is any reasonable support for it. This standard is not necessarily dependent, as such, on whether all of the grounds supporting the original administrative practice were valid in the abstract or whether a court would agree with them today. On the contrary, it is the reliance of ordinary people on the practice of the Government that makes it important to indulge every reasonable presumption in favor of the status quo. As stated in *United States v. Midwest Oil Co.,* 236 U.S. 459, 474-43 (1915):

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department — on the presumption that un-

24. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 423 (1978); *Saxbe v. Bustos,* 419 U.S. 65 (1974); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 381 (1969); *FHA v. Darlington, Inc.,* 358 U.S. 84, 90 (1958); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 739-40 (1950); *Norwegian Nitrogen Co. v. United States,* 288 U.S. 294 (1933); *United States v. Jackson,* 280 U.S. 183, 193, 196-197 (1930); *United States v. Minnesota,* 270 U.S. 181, 205 (1926); *Swendig v. Washington Water Power Co.,* 265 U.S. 322, 331 (1924); *Kern River Co. v. United States,* 257 U.S. 147, 154 (1921); *McLaren v. Fleischer,* 256 U.S. 477, 480-81 (1921); *LaRogue v. United States,* 239 U.S. 62, 64 (1915); *United States v. Midwest Oil Co.,* 236 U.S. 459, 472-73 (1915); *Logan v. Davis,* 233 U.S. 613, 627 (1914); *Kindred v. Union Pacific R. R.,* 225 U.S. 582, 596 (1912); *United States v. Hammers,* 221 U.S. 220, 228-29 (1911); *Hewitt v. Schultz,* 180 U.S. 139, 156 (1901); *Hawley v. Diller,* 178 U.S. 476, 488 (1900); *Hastings & Dakota R. Co. v. Whitney,* 132 U.S. 357, 366 (1889); *United States v. Burlington & Mo. River R. Co.,* 98 U.S. 334, 341-42 (1878).

authorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but *the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself* — even when the validity of the practice is the subject of investigation."

There is no need to belabor the controlling principle of statutory interpretation further. It is one which this Court has followed from its earliest days, and the Ninth Circuit's failure or refusal to follow it is manifest. Moreover, in this case the principle of *Tallman* is not invoked to uphold a doubtful but traditional construction of the statute as against a more logical one. Here, the *Tallman* rule simply makes it more plain that the most obvious and probable interpretation of the Boulder Canyon Project Act, the one Secretary Wilbur adopted, *must* be upheld as against criticism conceived long after the event by lawyers in no position to share the frame of mind of the 70th Congress.

II. THE TERMS OF THE BOULDER CANYON PROJECT ACT SHOW THAT THE 1928 CONGRESS DID NOT INTEND TO IMPOSE ACREAGE LIMITATION IN IMPERIAL VALLEY.

As discussed in *Arizona v. California,* 373 U.S. 546, 551-52 (1963), the background and scope of the Boulder Canyon Project Act make it unique and distinguish it from any other reclamation statute. Its primary purposes were, first, to implement the expectations of all the Colorado River Basin States that the natural flow of the Colorado would be regulated and conserved by the construction of a massive dam. Achievement of that purpose would assure availability of water for use in the Upper Basin States with an adequate supply still being assured for vested or future uses in the states of the Lower Basin. This purpose is accomplished by §§ 1, 4(b) and 8 of the Project Act. Section 1 provides for the construction of the dam. 43 U.S.C. § 617. Section 4(b) provides for its financing (43 U.S.C. § 617c), and § 8 provides that the Secretary shall observe the inter-

Basin water allocation established by the Colorado River Compact in the operation of the dam. 43 U.S.C. § 617g.

A second, closely related purpose was congressional endorsement of the Colorado River Compact which is accomplished by § 13. 43 U.S.C. § 617*l*.

The third and most innovative purpose of the Act was to create a "comprehensive scheme for apportionment among California, Arizona and Nevada of the Lower Basin's share of the mainstream waters of the Colorado." 373 U.S. at 565. "Congress did this by giving the Secretary power to make contracts for delivery of water and by providing that no person could have water without a contract." *Id.* These essential contracting provisions are spelled out plainly in § 5, in which the power to contract for water delivery is granted, and in § 6, in which that power is "significantly limited," most importantly by the Secretary's express obligation to satisfy present perfected rights in the Lower Basin. 43 U.S.C. §§ 617d, 617e.

A number of provisions of the Project Act refer directly to Imperial Valley. This is because, as the Court observed in *Arizona v. California*, the initial focus on the need for a Basin-wide project grew out of events in Imperial Valley. Thus, § 1 authorizes construction of the All-American Canal to the Imperial and Coachella Valleys, and specifies that no charge should be made by the Government for use of irrigation water delivered to these areas. Section 6, in its all-important guarantee of present perfected rights, was understood to deal pre-eminently with Imperial Valley. Section 4(b) is also keyed to Imperial Valley for it contains unique and independent provisions designed to assure that the cost of constructing, maintaining and operating the All-American Canal would not be reimbursed out of power revenues, but rather, would be repaid by the Imperial Valley farmers in accordance with the financing conventions of reclamation law. 43 U.S.C. § 617c.

Section 9 is the only provision in the Act dealing with acreage limitation. It provides that entries on any *public lands* susceptible of irrigation by the works authorized in the Act should be limited to tracts "not exceeding one hundred and sixty acres." 43 U.S.C. § 617h.

Finally, §§ 14 and 18 are relevant here. Section 14 provides that the "Act shall be deemed a supplement to the reclamation law" and that the reclamation law "shall govern the construction, operation and management of the works . . . *except as otherwise herein provided.*" 43 U.S.C. § 617m. Section 18 states that nothing in the Project Act should be construed as "interfering with such rights as the States now have . . . to adopt policies and enact such laws as they may deem necessary with respect to appropriation, control and use of waters within their borders. . . ." 43 U.S.C. § 617q.

It is from a synthesis and reconciliation of all these provisions of the Project Act taken together, and then in light of the legislative history, that the 1928 Congress' intention with respect to acreage limitation must be ascertained. As shown below, the terms of the statute and its legislative history leave no room for doubt on that score. They confirm that Secretary Wilbur was correct when he concluded in 1933 that Congress did not intend to impose acreage limitation in Imperial Valley.

A. The Congressional Mandate in § 6 for Satisfaction of Present Perfected Rights, Which Was Intended Specifically to Protect the Existing Water Uses in Imperial Valley, Negates Any Intention to Impose Acreage Limitation.

In § 6 of the Project Act, Congress directed the Secretary, without qualification or condition, to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." 43 U.S.C. § 617e. Section 6 is one of the most important provisions of the Act. As this Court stated in *Arizona v. California*:

> "One of the most significant limitations in the Act is that the Secretary is required to *satisfy* present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6." 373 U.S. at 584.

When it made satisfaction of present perfected rights a mandatory part of its plan for the Colorado River, Con-

gress clearly had the farmers of Imperial Valley in mind. Article VIII of the Compact, the first expression of the concept of present perfected rights, had originated in response to a demand by Imperial Valley water users for protection. As Delph Carpenter, one of the drafters of the Compact, explained to Congress:

> "During the deliberations of the Colorado River Commission in Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty. . . . The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor. . . .
>
> "In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, Article VIII of the Compact was drawn at the last session of the proceedings." *Hearings Pursuant to S. Res. 320,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess. at p. 678 (1925); LX-DD(C).

Consistent with the origin of the term, when "present perfected rights" was used in the congressional proceedings leading to the Project Act, it was typically defined by reference to the rights of landowners in Imperial Valley. For example, when Congressman Raker asked about the meaning of Article VIII during the House hearings, Commissioner Davis of New Mexico answered:

> "It first recognizes the fact, to speak of the existing situation, that the compact shall not affect the actual appropriations — *valid appropriations — in the Imperial Valley* or anywhere else on the River. Then it says that after storage capacity . . . has been created . . . the rights of those appropriated down below will be satisfied out of the storage instead of out of direct flow." *Hearings on H.R. 2903,* House Comm. on Irr. & Recl., 68th Cong., 1st Sess. 1769 (1924); LX-DD(B).

In the words of Congressman Hudspeth, the Project Act's § 6 mandate for satisfaction of present perfected rights

was specifically intended to apply to "the lands in Imperial Valley." *Hearings on H.R. 6251 and H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess. 167 (1926); LX-DD(D).

In *Arizona v. California,* this Court defined a "perfected right" as a water right "acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land. . . ." 376 U.S. at 341. A "perfected right" is "present" for purposes of the Act if it existed as of December 21, 1928, the effective date of the Project Act. Since 424,145 acres of privately-owned land were under irrigation in the Imperial Irrigation District as of that date, this Court has set the measure of Imperial's perfected rights at 2.6 million acre feet per year, or the quantity of water necessary to irrigate 424,145 acres, whichever is less, with a priority date of 1901. *Arizona v. California,* 439 U.S. 419, 429 (1979).

If acreage limitation were to be applied in the Valley in accordance with the lower court's decision, the Secretary would be under a duty to cut off water for 233,000[25] of the 424,145 acres which account for and are the source of the District's present perfected rights. No exercise in logic can reconcile the Secretary's § 6 duty to deliver water in full satisfaction of the present perfected rights held for the Valley's 424,145 acres with a theory that the Project Act also commands the Secretary to cut off delivery of such water to more than half the acres having beneficial entitlement to it. As the district court held, the "duty of the Secretary [under § 6] to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water and the exercise of these rights." 322 F.Supp. at 18; Pet. Apx. 83a.

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25. It was stipulated at trial that "as of September 3, 1965, private landowners in the District held approximately 233,000 acres of irrigable lands which were in excess of 160 acres per single owner." II-CR 18.

The court of appeals strained to attempt to reconcile § 6 with its assumption that Congress intended acreage limitation. It did this by constructing an argument, neither briefed nor argued, based upon an erroneous interpretation of California irrigation district law that *legal title* to irrigation water is held by the District in trust for its constituent landowners. The court hypothesized that the Secretary's § 6 duty could be construed as owing only to the District, as holder of the legal title to the Valley's present perfected rights; and, that once water is formally delivered to the District, the Secretary could compel the District to withhold distribution of that water to 233,000 acres of its constituent farm land without in any way violating his § 6 duty.[26]

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26. California's law on the division of ownership rights in appropriated water is complex and may be unique in the western states. While it is literally correct that "no particular landowner or particular piece of land is entitled to any particular portion of the water to which the irrigation district owns rights" (559 F.2d at 528-29), acreage limitation has been permitted for California irrigation districts only where the water right belongs to the federal government, not the district. *See Ivanhoe Irr. Dist. v. All Parties,* 53 Cal. 2d 692, 704; 350 P. 2d 69, 75; 3 Cal. Rptr. 317 (1960). Where the district itself has unqualified title to the water right, there is a long line of California cases which establish that individual owners within such a district can indeed compel the district (like any other public service water company) to continue service to their particular lands without discrimination based on size of ownership. *San Bernardino Mun. Water Dist. v. Meeks & Daley Water Co.,* 226 Cal. App. 2d 216, 222-23; 38 Cal. Rptr. 51, 54-55 (1964); *Erwin v. Gage Canal Co.,* 226 Cal. App. 2d 189, 194-95; 37 Cal. Rptr. 901, 904 (1964); *Henderson v. Oroville-Wyandotte Irr. Dist.,* 207 Cal. 215, 220; 277 Pac. 487, 489 (1929); *Bent v. Second Extension Water Co.,* 51 Cal. App. 648, 650; 197 Pac. 657, 658 (1921); *Riverside Land Co. v. Jarvis,* 174 Cal. 316, 321-25; 163 Pac. 54, 57-58 (1917); *Leavitt v. Lassen Irr. Co.* 157 Cal. 82, 92-93; 106 Pac. 404, 408 (1909), *Orcutt v. Pasadena Land & Water Co.,* 152 Cal. 599, 600; 93 Pac. 497, 497-98 (1908); *South Pasadena v. Pasadena Land & Water Co.,* 152 Cal. 579, 587-88; 93 Pac. 490, 494 (1908), *San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County,* 191 Fed. 875, 895 (C.C.N.D. Cal. 1911). Contrary to the Ninth Circuit, such owners can block addition of new acreage

(Footnote continued on next page.)

The lower court's reading of § 6 is impossible to support in the historic context of the Compact and the Project Act. The protection of "present perfected rights" was inserted in the Compact at the instigation of Imperial Valley farmers concerned with *their* lands. The guarantee was drafted to protect these people. With knowledge of that background, Congress mandated that the rights of those people be *satisfied.* 373 U.S. at 566-67. Throughout the congressional proceedings, "present perfected rights" were described with reference to the farmers in the Valley who were then using the water. The guarantee of § 6, as this Court emphasized in *Arizona v. California,* was a matter of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.* at 584. The "intense" concern this Court referred to was plainly the concern of users for their existing livelihood, not a theoretical concern for a "total quantity of water" that would be unuseable without a restructuring of Imperial Valley's then twenty-year old economy. To accept the court of appeals' theory, it is necessary to assume that the draftsmen of the Compact and the congressmen who extended the Compact's guarantee in § 6 of the Project Act were playing word games with the people of the Imperial Valley. That assumption does no credit to them, or to the court that hypothesized it.

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to the service area of the district if that addition would deplete their established level of water service. *Fellows v. City of Los Angeles,* 151 Cal. 52, 63; 90 Pac. 137, 141 (1907); *Butte County Water Ass'n v. Railroad Comm'n,* 185 Cal. 218, 235-38; 196 Pac. 265, 273 (1921) [concurring opinion]; *Byington v. Sacramento Valley West Side Canal Co.,* 170 Cal. 124, 130; 148 Pac. 791, 793 (1915) [*dictum*]. Clearly a state-initiated curtailment of established water service would, at a minimum, entitle the landowner to compensation under the law of eminent domain. *San Bernardino Mut. Water Dist. v. Meeks & Daley Water Co., supra,* 226 Cal. App. 2d at 223, 38 Cal. Rptr. 51, 54-55.

Thus, it is incorrect that the District's ownership of *legal title* to the present perfected right means that its landowners do not have an enforceable right under California law to compel the District to continue water service to their individual lands.

B. Section 1 of the Project Act Indicates a Congressional Understanding that Acreage Limitation Was Not Applicable to Imperial Valley.

Section 1 of the Project Act provides in part that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella valleys." 43 U.S.C. § 617. Secretary Wilbur correctly pointed to this provision as reflecting a congressional awareness that users in Imperial Valley had vested appropriative rights to water for their lands, and as indicating a congressional intention not to disturb those rights. LX-AO; Con. Apx. 177a.[27]

To understand the strength of Wilbur's reasoning, it is important to bear in mind that in 1933, he had a much fresher understanding of the contemporary attitude about federal reclamation policy and its basis than we can deduce today. The 160-acre limitation had its origin in § 5 of the Reclamation Act of 1902. That section provided for the *sale* of water rights to individual farmers, and acreage limitation was made a restriction upon the Government's willingness to sell. Today the sale mechanics of § 5 are a thing of the past, but in 1928, as Secretary Wilbur recognized, the 1902 system was likely to have been much more prominent in congressional thinking. Up to that time, the sale of at least a supplemental water right had been the customary basis for imposition of an acreage limitation. This was considered to be so fundamental that the Bureau of Reclamation had construed even the general reclamation law to permit delivery of water to owners of farms on federal projects which were in excess of 160 acres where such deliveries merely satisfied pre-project vested rights, without more.[28] Because contemporary thinking equated acreage

27. No similar water right existed in the Coachella Valley, but at the time, all concerned anticipated that Coachella would be annexed to the Imperial Irrigation District. The inclusion of Coachella in the § 1 proviso no doubt represented a legislative judgment that it was not advisable to charge for some of the water used within the single district, while not charging for water delivered to supply existing rights. It is plain from the legislative history, in any case, that the § 1 proviso was indeed one of several manifestations of the intention of the 70th Congress to satisfy the pre-existing rights of Imperial Valley farmers.

28. *See,* Wilbur Letter at Con. Apx. 177a; 43 C.F.R. § 230.70.

limitation with the sale of a water right, the fact that Congress explicitly prohibited any charge for delivery of water to Imperial Valley was reflective of a belief that Imperial Valley, because of its vested pre-project water rights, was not an appropriate case in which to impose an acreage limitation.[29]

As late as 1941, the relationship between the sale of supplemental water and acreage limitation was thought to be crucial to application. B. P. King, in his exhaustive study of the acreage limitation laws, concluded for that very reason that the § 1 proviso in the Project Act precluded application of acreage limitation. King stated:

> ". . . even if the Boulder Canyon Project Act should be interpreted as bringing into operation all general provisions of the reclamation laws, it is still doubtful that there are any excess lands restrictions applicable under the facts presented. *The All-American Canal project does not involve the sale of supplemental water or water rights* since by section 1 of the Boulder Canyon Act it is stipulated that: 'No charge shall be made for the use, storage, or delivery of water for irrigation . . . purposes in the Imperial or Coachella Valleys.'" KING, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS, App., p. 4 (1941); LX-BO, App., p. 4.

The legislative discussion of the § 1 proviso supports the interpretation Wilbur and later B. P. King placed on it. Thus, during the debates on the Project Act, Senator King explained that the basis for the § 1 proviso was the intent to recognize Imperial's existing rights:

> "[T]he lands in the Imperial Valley which have been irrigated have, perhaps a vested right, and it might be

29. This point of view is demonstrated in the analysis by the Bureau's Chief Counsel, Porter Dent, who noted that Secretary Wilbur's rationale with respect to § 5 of the 1902 Act was also probative of the inapplicability of § 46 of the 1926 Act. "In my view," he said, "the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect." LX-AR, pp. 1-2; Con. Apx. 179a-180a.

questionable whether we have the power to impose a charge upon them for the use of water. At any rate, I gave them the benefit of all doubt, and I have offered this amendment, the effect of which if adopted, will be that the Imperial Valley and the Coachella Valley will not be required to make payment for storage waters." 70 *Cong. Rec.* 528.

The congressional directive not to charge for use of water in Imperial Valley was, in effect, an express acknowledgment of the status quo and a command not to disturb it. That command was plainly inconsistent with any intention to disrupt the status quo by denying water to those who were then using it and by requiring breakup of their farms.

C. The Inclusion in § 9 of an Acreage Limitation Provision as to Public Lands and the Omission of any Corresponding Provision for Acreage Limitation as to Privately-Owned Lands Strongly Indicate that Congress Did Not Intend Imposition of Acreage Limitations on Private Lands.

In § 3 of the 1902 Act, Congress provided that if *public land* within a project were opened to entry, homesteads should be limited to tracts not exceeding 160 acres. In § 5 it made provision for a comparable 160-acre limitation in the case of sale of water rights to *private lands.* Beginning with this first enactment, general reclamation law has contained separate but closely parallel provisons for public lands, on the one hand, and for private lands, on the other.

In the Project Act, by contrast, Congress enacted an explicit provision in § 9 limiting *public lands* to "tracts . . . not exceeding one hundred and sixty acres," but conspicuously omitted any comparable provision for acreage limitation as to private lands. The very fact that Congress enacted § 9 shows that it gave thought about the extent that it wanted acreage limitation to be applicable under the Project Act. Likewise, § 9 shows the way that Congress thought that provision for acreage limitation ought to be covered — by words explicitly stating its intent. Having spelled out its intention to apply acreage limitation to public lands that might be served by the project, Congress

surely would also have expressly provided for acreage limitation as to private lands if it had intended that result. Having explicitly addressed the subject as to public lands, there was only one reason for Congress to remain silent about private lands: it did not in fact intend imposition of acreage limitation on such lands.

D. Section 4(b) of the Project Act Establishes a Contracting System Plainly Inconsistent with That of § 46 of the Omnibus Adjustment Act of 1926.

Reimbursement of the Government for the All-American Canal is covered explicitly by § 4(b) of the Project Act, which provides in material part that:

> "Before any money is appropriated for the construction of said main canal and the pertinent structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California . . . the Secretary of the Interior shall make provisions for revenues by contract, or otherwise, adequate in his judgment to ensure payment of all expenses of construction, operation and maintenance of said canal and appurtenant structures in the manner provided in the reclamation law."

The Ninth Circuit held that the phrase "in the manner provided in the reclamation law" means that § 46 of the 1926 Act must govern the repayment contract for the All-American Canal. "At that time the portion of the reclamation law governing contracts for repayment of costs . . . was Section 46." 559 F.2d at 527. This ignores that fact that the text of § 4(b) distinguishes between (1) the means used to secure repayment ("contract or otherwise"), and (2) the terms and accounting conventions for repayment ("in the manner provided in the reclamation law").[30] The

30. As shown more fully below, the legislative history fully supports this interpretation. *See,* pp. 51-53, *infra.* The fiscal conventions for repayment under reclamation law include such things as the absence of any interest obligation, segregation of construction costs from operating and maintenance costs with different standards applicable to reimbursement of each, exclusion of certain administrative costs from the reimbursement obligation, and deferral of the first installment obligation until completion of construction.

reference to reclamation law refers only to the latter. It does not specify that the means of securing repayment be a § 46 contract, but leaves the means to the Secretary's discretion.

That § 4(b)'s reference to reclamation law was not intended to require a § 46 contract is made evident by the obvious inconsistency between the means of repayment contemplated in the first part of § 4(b) and the § 46 means which would have been mandatory if the authors had intended § 46 to govern. Section 46 of the 1926 Act establishes a specific, unitary and mandatory means of securing repayment on new reclamation projects. It provides that

> "No water shall be delivered on the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under state law providing for the payment by the district or districts of the cost of construction, operating and maintaining the works during the time they are in the control of the United States. . . ." 43 U.S.C. § 423e.

Nothing could be more obvious than the fact that the means authorized by § 4(b) of the Project Act for securing repayment are inconsistent with § 46 of the 1926 Act. While § 46 is mandatory in requiring a contract, § 4(b) does not require the Secretary to obtain any contract at all. While § 46 is explicit in requiring a joint liability contract with an irrigation district, § 4(b) of the Project Act leaves the contracting entity, if any, to the discretion of the Secretary. And while § 46 contemplates a contract *after* construction of work but *before* delivery of water, § 4(b) *requires* that provision for repayment *precede* construction.[31]

The Ninth Circuit brushed aside the inconsistency between the absolute requirement of a joint-liability contract

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31. The Bureau of Reclamation's Chief Counsel, Porter Dent, emphasized in his March 1, 1933 letter to the District that this critical distinction between § 4(b) of the Project Act and § 46 of the 1926 Act supported the Department's conclusion that § 46 was not made applicable by the Project Act to Imperial Valley. LX-AR, p. 2; Con. Apx. 179a-81a.

in § 46 and the fact that the Project Act explicitly permitted the Secretary to dispense with any contract at all. It satisfied itself with the statement that "[w]hatever might have been the case if the Secretary had 'otherwise' insured repayment, the method chosen in the case of Imperial Valley was a contract." 559 F.2d at 530. This statement is a truism that proves nothing. Because the Secretary entered into a contract pursuant to §4 (b) does not mean that such contract was a § 46 contract. On the contrary, as above indicated, the Secretary's contract *could not* comply both with the terms of § 46 and the terms of § 4(b). One must give way, and as a specific provision of the controlling statute, § 4(b) must be deemed to prevail and to override § 46.

E. The General References to Reclamation Law in § 14 And Elsewhere Have a Reasonable Meaning Which Does Not Imply Application of Acreage Limitation Requirements in Imperial Valley.

Section 14 provides that:

> "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the *construction, operation, and management* of the works herein authorized, *except as otherwise herein provided.* 43 U.S.C. § 617m.

Respondents and the court below have relied heavily on this general reference to reclamation law as incorporating the acreage limitation provision in § 46 of the 1926 Act. However, there are two fundamental reasons why this position is wrong. First, by its own terms — "except as otherwise herein provided" — § 14 is expressly subordinated to the specific provisions in the body of the Act. And, as previously noted, the specific provisions in the body of the Act cannot exist side by side with an implied application of § 46. The mandate in § 6 for satisfaction of present perfected rights precludes implication of the § 46 acreage limitation provisions; § 1 indicates the same intent to satisfy Imperial's pre-existing rights; and the repayment provisions in § 4(b) are directly contradictory to the provisions governing § 46 contracts.

Second, § 14 makes reclamation law applicable only to the "construction, operation and management" of project works. As the district court found (322 F. Supp. at 17), these words have a particular and limited meaning in the idiom of the statute. They refer to the business and fiscal aspects of project management, and not to matters of social control, such as acreage limitation, governing water deliveries. This conclusion is the same one that was reached by B. P. King in his definitive study of the excess land laws, which was compiled for the Bureau of Reclamation in 1941. After analyzing the Project Act, King concluded as follows with respect to the language of § 14:

> "The specific language [of § 14] in this case is that the reclamation law 'shall govern the construction, operation and management of the works.' 'Operation and management,' of course, are terms susceptible of broad definition, but it seems doubtful that these terms could be construed as bringing into operation the excess lands restrictions. 'Operation and management' appears to connote the business aspects of control, rather than social policy aspects. If Congress had intended to make the excess lands restrictions operative, it seems a reasonable assumption that some such language as follows would have been used:
>
> > 'Which said reclamation law shall govern the construction, operation and maintenance of said works and the use of water therefrom.'" LX-BO, App., pp. 3-4.

Analysis of the balance of the Project Act bears out the point that the 1928 Congress consistently used the words "construction, operation and management" in a sense wholly distinct from "delivery" of water, which is the function affected by acreage limitations.[32] Perhaps such separation would have little significance if it occurred only once, but where the same distinction is carefully expressed

32. For example, the Project Act distinguishes between, and treats separately, the Secretary's authority to enter into contracts for the "construction, operation and maintenance" of the Project facilities, and his authority to enter into contracts for "delivery" of irrigation water. Section 10 authorizes:

(Footnote continued on next page.)

in four widely separated parts of the Act, there is a strong inference that Congress ascribed a meaning to the distinction. Thus, when Congress used the phrase "construction, operation and management" in § 14 with reference to general provisions of reclamation law, it is logical to conclude that Congress did not intend this phrase to incorporate provisions of general reclamation law governing "delivery" or "use" of water.

The conclusion that § 14 had a limited purpose and was never intended as a wholesale incorporation of reclamation law is confirmed by § 9's elaborate provisions for applying

> ". . . . The Secretary of the Interior . . . to enter into contract or contracts with said district or other districts, persons or agencies for the *construction*, in accordance with this Act, of said canal and appurtenant structures, and also for the *operation* and *maintenance* thereof, with consent of the other users." 43 U.S.C. § 617i.

Section 5 separately authorizes the

> "Secretary . . . to contract for storage of water in said reservoir and for the *delivery thereof* at such points on the River and on said canal as may be agreed upon, for irrigation and domestic uses. . . ." 43 U.S.C. § 617d.

The provisions of the Act relating to reimbursement of the Government also distinguish between payments for the "construction, operation and maintenance" of the canal and payments for "use, storage and delivery of water." Thus, § 1 provides:

> ". . . That no charge shall be made for water or for the use, storage or *delivery* of water for irrigation . . . in the Imperial or Coachella Valleys. . . ." 43 U.S.C. § 617.

On the other hand, § 4(b) provides that charges shall be made for "construction, operation and maintenance" of the canal, again clearly indicating that "delivery" was treated separately from "construction, operation and maintenance." 43 U.S.C. § 617c(b).

The same distinction is preserved in § 8, where Congress directed that *both* "construction, operation and maintenance" *and* "delivery and use of water" were to conform to the Colorado River Compact. Section 8 employs language distinguishing "delivery" of water from "construction, operation and maintenance" of works. It provides that the Colorado River Compact shall govern:

> ". . . the construction, management and operation of said reservoir, canals and other works *and* storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in this Act to the contrary notwithstanding. . . ." 43 U.S.C. § 617g.

acreage limitations and other reclamation law provisions on public lands. As previously noted, § 9 limits entries on public lands to 160 acres, precisely the limitation also found in § 3 of the 1902 Act. Section 9 also spells out a veteran's preference for entry of Imperial Valley public lands. That preference is almost identical to the preference found in general reclamation law.[33] In addition, § 9 specifically directs that subsection C of § 4 of the Fact Finder's Act (43 U.S.C. § 433) be applicable to entrymen on public lands opened for entry as a result of the Project, even preferred veterans.

If Congress had believed that it was incorporating all provisions of reclamation law by adopting § 14, the elaborate provisions in § 9 would serve no purpose. Everything that § 9 directs would have been mandated by general reclamation law provisions supposedly incorporated by § 14. The fact that Congress felt it necessary to spell out land-use provisions in § 9 that were substantially identical to provisions already contained in the general reclamation law confirms that Congress did not believe that § 14's general reference to reclamation law had the effect of mandating application of the land-reform provisions of reclamation law in Imperial Valley.

Ultimately, if there were any doubt about the foregoing interpretation of § 14's limited scope, it is dispelled by the legislative history. As next discussed, the legislative history confirms that no one in the 1928 Congress intended that § 14 would silently incorporate an acreage limitation requirement applicable to private lands in Imperial Valley.

III. THE LEGISLATIVE HISTORY OF THE PROJECT ACT AS A WHOLE CLEARLY INDICATES THAT CONGRESS DID NOT INTEND TO APPLY ACREAGE LIMITATIONS TO IMPERIAL VALLEY.

The history of the Project Act was fully examined by the Court in *Arizona v. California*, 373 U.S. at 551-61. There is

33. The only distinction was that the general reclamation law provided for a preference of 90 days or more, while § 9 provided for a preference of three calendar months. 43 U.S.C. § 186.

no need to repeat here the broad outline of that history.[34]

34. The first of the Swing-Johnson bills were introduced in 1922. S. 3511, 67th Cong., 2d Sess., 62 *Cong. Rec.* 5929 (April 25, 1922); H.R. 11449, 67th Cong., 2d Sess., 62 *Cong. Rec.* 5985 (April 25, 1922). Extensive hearings were conducted by the House Committee on Irrigation of Arid Lands. *Hearings on H.R. 11449,* House Comm. on Irr. of Arid Lands, 67th Cong., 2d Sess., Parts. I-V (1922-23). Neither the Senate nor House bill was reported out of committee. In 1923, Swing and Johnson again introduced identical bills. S. 727, 68th Cong., 1st Sess., 65 *Cong. Rec.* 146 (Dec. 10, 1923); H.R. 2903, 68th Cong., 1st Sess., 65 *Cong. Rec.* 217 (Dec. 10, 1923). Hearings were conducted in both houses. *Hearings on S. 727,* Senate Comm. on Irr. & Rec., 68th Cong., 2d Sess., Parts I-II (1924-25); *Hearings on H.R. 2903,* House Comm. on Irr. & Rec., 68th Cong., 1st Sess., Parts I-IX (1924). Again, neither bill was reported out of committee. Johnson and Swing renewed the effort in 1925, again introducing companion bills. H.R. 6251, 69th Cong., 1st Sess., 67 *Cong. Rec.* 1313 (Dec. 21, 1925); S. 1868, 69th Cong., 1st Sess., 67 *Cong. Rec.* 1232 (Dec. 21, 1925); H.R. 9826, 69th Cong., 1st Sess., 67 *Cong. Rec.* 4730 (Feb. 27, 1926); S. 3331, 69th Cong., 1st Sess. (Feb. 27, 1926). After hearings before the Senate Committee on Irrigation and Reclamation, *Hearings on S. Res. 320,* Senate Comm. on Irr. & Rec., 69th Cong., 1st Sess., Parts I-IV (1925), one of the Johnson bills, S. 3331, was reported out of committee with a recommendation for passage, but it did not come to a vote on the floor. *S. Rep. No. 654,* 69th Cong., 1st Sess. (1926). In the House hearings were held on the Swing bill. *Hearings on H.R. 6251 and H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess., Parts I-II (1926); *Hearings on H.R. 9826,* House Comm. on Rules, 69th Cong., 2d Sess., Parts I-III (1927). H.R. 9826 was reported favorably out of committee, *H. Rep. No. 1657,* 69th Cong., 2d Sess. (1926), but did not come up for a vote. In 1927, during the first session of the 70th Congress, Swing introduced H.R. 5773, and Johnson, S. 728. H.R. 5773, 69 *Cong. Rec.* 97 (Dec. 5, 1927); S. 728, 69 *Cong. Rec.* 341 (Dec. 9, 1927). After hearings, *Hearings on H.R. 5773,* Before the House Comm. Irr. & Recl., 70th Cong., 1st Sess., Parts I-IV (1928), the House Committee reported favorably on H.R. 5773. *H. Rep. No. 918,* 70th Cong., 1st Sess. (1928). The Bill passed the House on May 25, 1928. In the Senate, hearings were held on S. 728 (*Hearings on S. 728 and S. 1274,* Senate Comm. on Irr. & Recl., 70th Cong., 1st Sess. (1928), and it was reported out of committee on March 20, 1928, *S. Rep. No. 592,* 70th Cong., 1st Sess. (1928). Debate on the Senate floor prevented a vote on S. 728 during the first session. At the beginning of the second session, the Senate undertook consideration of H.R. 5773, which had passed the House. Under the

(Footnote continued on next page.)

Of concern here is that part of the history which bears on the congressional understanding of the effect that the statutory language would have on applicability of acreage limitation in Imperial Valley. Examination of this history shows that the administrative practice initiated by Secretary Wilbur in 1933 faithfully reflected the congressional intent.

A. Congress Understood That An Explicit Provision Would Be Needed If It Wished To Impose Acreage Limitation in Imperial Valley, And Congress Deliberately Excluded Such A Provision From The Bill Adopted.

1. The Hearings on the Swing-Johnson Bills show that Congress did not intend that land limitation provisions would be made applicable to Imperial Valley merely by general references to the Reclamation Law.

Section 14 of the Project Act first appears as § 13 of H.R. 9826, the fourth of the Swing-Johnson bills, LX-E, p. 30. During the hearings on H.R. 9826, a question arose as to whether the bill would subject private lands in the Imperial Valley to acreage limitations. Congressman Phil Swing, the author of the bill, and Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, both stated unequivocally that the bill would not make acreage restrictions applicable in Imperial Valley:

"Mr. SINNOTT. I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"Doctor MEAD. This bill does not go beyond provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands at all.

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floor management of Senator Johnson, S. 728 was substituted as an amendment to H.R. 5773, and in that form the bill passed the Senate on December 14, 1928. Four days later the House passed the Senate-substituted version of the bill, and it was signed by President Coolidge on December 21, 1928.

"The CHAIRMAN [Congressman Addison T. Smith]. That is reserved for future legislation?

"Doctor MEAD. Yes, Sir.

"Mr. SINNOTT. But as to the old land —

"Doctor MEAD. As to the old land, it would be sold water under a Warren contract.

"Mr. SINNOTT. *The present owner can occupy his present farm unit?*

"Doctor MEAD. *Yes, sir.*

"Mr. SINNOTT. No matter what that might be?

"Doctor MEAD. *Yes.*

"Mr. SINNOTT. What is that now in the Imperial Valley?

"Doctor MEAD. Of course, it varies widely. There is not any law. There are a good many large holdings there.

"...

"Mr. SINNOTT. What is it Mr. Swing?

"Mr. SWING. I think outside of one or two large holdings that the average is about 80 acres, taken by and large. The average will run around 80-acre tracts. There are some over a thousand acres.

"...

"Mr. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, *as is now in the present reclamation law*?

"Mr. SWING. *No, sir.*" *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess., pp. 32-33 (1926); LX-DD(D).

This portion of the legislative history is of crucial importance. As previously noted, the bill under consideration had a provision, then in § 13, which was identical to § 14 of the final Project Act. Congressman Sinnott

asked whether "*any* provision in the bill" would limit acreage, and Commissioner Mead answered that none would. Similarly, Congressman Swing focused on the entire bill, in stating that there was nothing in it that would require acreage limitation. Moreover, it is important to note that in his final question Congressman Sinnott explicitly asked whether anything in the bill would require the sale of excess lands "as is now in the present reclamation law". This question undeniably shows that members of the Committee did not believe that the general reference to reclamation law in § 14 would incorporate acreage-limitation provisions "now in the present reclamation law."[35] And just as plainly, Congressman Swing and Commissioner Mead were telling them that their understanding was correct.[36]

2. Insertion of an acreage limitation provision, and its deletion from the final bill.

(a) **H.R. 9826.** After completion of the 1926 hearings on H.R. 9826, Congressman Leatherwood of Utah, a persistent critic of the bill, prevailed upon the House Committee to

35. "These hearings were held in February and March of 1926, while Section 46 was not enacted into law until May of 1926." 559 F.2d at 533. However, at that time § 12 of the Reclamation Extension Act of 1914, a forerunner of § 46, provided that no water should be delivered to an owner of lands exceeding 160 acres until he had agreed to sell the acreage at a price set by the Secretary. 38 Stat. 689, 43 U.S.C. § 418.

36. Similarly, during the 1924 House hearings on H.R. 2903, the second Swing-Johnson bill, Congressman Raker questioned whether it might not be advisable to impose acreage restrictions on the owners of any undeveloped lands which might be brought under irrigation by the project works. In response, Arthur P. Davis, co-author of the Fall-Davis Report and the former Director of the Reclamation Service, noted that there were several acreage limitation provisions in general reclamation law. Even though the bill contained a provision like, § 4(b) of the Project Act, calling for "reimbursement in accordance with the terms of repayment prescribed in . . . the reclamation law" (LX-B, p. 2), both Raker and Davis agreed that the acreage limitations of the general reclamation law would *not* apply without specific provision to that effect in the bill. As Davis put it, "something" more specific would have to be put in the bill. *Hearings on H.R. 2903,* 68th Cong., 1st Sess., p. 1448 (1924); LX-DD(B).

insert an acreage limitation provision in § 1. Congressman Leatherwood asked for this provision because he recognized that the bill, as it stood, would not impose such a limitation in Imperial Valley. This is what Swing and Mead had told the Committee, including Congressman Leatherwood, at the hearings. This is what the Committee had been told two years earlier at hearings on similar legislation (*see* fn. 36), and this is what every congressional discussion of the acreage limitation issue took for granted during the entire proceedings on the Swing-Johnson bills. It was clearly understood that if acreage limitation were to apply, an express provision would be required: acreage limitation could not be implied through the backdoor with § 14's general reference to reclamation law. H.R. 9826, amended as proposed by Leatherwood, was reported out by the House Committee, but it never came up for a vote.

(b) **S. 3331.** While proceedings were going forward on H.R. 9826, Senator Johnson's companion bill, S. 3331, cleared Committee and was debated on the floor of the Senate. S. 3331 contained a provision identical to § 14 of the Project Act. LX-F, p. 13. There is *no* evidence that any senator believed that S. 3331 taken as a whole would make acreage limitation applicable to Imperial Valley. There is, however, very strong evidence that the Senate *did not* believe that the general language of incorporation would make acreage limitation applicable.

Thus, Senator Phipps of Colorado offered an amendment to § 5 of S. 3331 which, if accepted, would have provided that "all contracts for the delivery of water for irrigation purposes" must include acreage limitation provisions similar to those required by § 46 of the 1926 Act. LX-DA, p. 2. Phipps also offered a substitute bill, and in § 5(b) it contained recordable contract and acreage limitation provisions worded similarly § 46 of the 1926 Act. LX-CU, pp. 6-7. Importantly, this substitute bill, like S. 3331 contained general language of incorporation identical to that found in § 14 of the Project Act. LX-CU, p. 16.

Senator Phipps' amendments are particularly significant in light of the fact that "it could hardly have escaped the

attention of the Senate that at that time the reclamation law also provided significant acreage limitations in its provisions for contracts with irrigation districts." 559 F.2d at 533. Senator Phipps was the Chairman of the Senate Committee on Irrigation and Reclamation. He had participated in all the Senate hearings on the Swing-Johnson bills. Although Phipps was well aware of the provisions of general reclamation law imposing acreage limitation, it plainly was his understanding that the general language of § 14 of the Project Act would not make those provisions applicable in Imperial Valley. Surely, if a contrary view had ever been expressed in the Senate proceedings Phipps would have been aware of it. Undoubtedly, if he had ever heard such a contrary view and given it credence, he would not have found it necessary to urge explicit language on acreage limitation over and above general reference to reclamation law.

(c) **S. 728 — The Boulder Canyon Project Bill.** When the 70th Congress convened, Swing and Johnson introduced new bills. The House bill, H.R. 5773, contained the explicit acreage limitation proviso which had been inserted into H.R. 9826 at Congressman Leatherwood's insistence during the prior session. LX-I, pp. 2-3. Johnson's bill, S. 728, did not contain any such provision. LX-J, pp. 1-2. This was the first time that the companion bills introduced by Swing and Johnson differed materially in their wording. In these circumstances, the omission from S. 728 of language parallel to the acreage limitation proviso in H.R. 5773 cannot be deemed to have been inadvertent.

During the Senate Committee's deliberations on S. 728, Senator Ashurst proposed adding the acreage limitation language contained in § 1 of the House bill. The Committee refused this proposal. *S. Rep. No. 592,* 70th Cong., 1st Sess., part II, pp. 3, 5, 26 (1928); LX-DD(J). Section 13 of S. 728 was identical to § 14 of the final act. LX-J, p. 18. Quite obviously, if this general language had been understood by anyone to mandate incorporation of § 46, Senator Ashurst's proposed amendment would have been unnecessary.

The Senate Committee also had before it a bill authored by Senator Phipps, S. 1274. As with Phipps' earlier bill, S. 1274 was an alternative to Johnson's bill and included an express acreage limitation provision. LX-DD(H), pp. 2-3. S. 1274 also included language identical to § 14 of the Project Act. *Id.* at 5. Again, the express acreage limitation language contained in S. 1274 would have been unnecessary if Phipps and his colleagues had construed the bill's general references to reclamation law as incorporating the acreage limitation scheme of § 46 of the 1926 Act.

When S. 728 was reported out of the Committee on Irrigation and Reclamation, Senator Ashurst filed a minority report. He objected to S. 728's failure to include an acreage limitation provision applicable to private lands:

> "I object to this Bill for the following reasons:
>
> "...
>
> "13. Because the Bill authorizes the expenditure of $50 million of federal funds to irrigate lands owned largely by private land speculators in California on units in excess of 160 acres. . . .
>
> ". . . I offered an amendment before the Committee that would subject the privately owned lands to the same conditions as lands in other irrigation projects privately owned, so that no water user might secure water for land in excess of 160 acres. This amendment is not included in the Bill as reported to the Senate." *S. Rep. No. 592,* 70th Cong., 1st Sess., part II, pp. 3, 5, 26 (1928); LX-DD(J).

Thus, as S. 728 cleared Commitee and came before the entire Senate, the issue had been drawn as to whether acreage limitation should be imposed in Imperial Valley. Early in the floor debates Senator Hayden offered an amendment to § 9 that would have imposed limitations on private lands, comparable to that section's 160-acre limitation for

public lands. 69 *Cong. Rec.* 7635; LX-DD(M). Hayden spoke in support of this amendment at length, arguing that S. 728 contained no provisions which would restrict water deliveries to privately owned lands. 69 *Cong. Rec.* 7634-35; LX-DD(M). He contended that Congress in the past had "adopted a very definite policy . . . of limiting the acreage in private ownership," and read the recommendations made from the *Fact Finders' Report* for effective anti-speculation measures. Hayden also read the land limitation provisions Congress had included in the 1924 statute authorizing the Coolidge Dam on the San Carlos Project. He emphasized that the House bill contained an express acreage limitation provision (the Leatherwood proviso), and stated that his amendment was intended to have an equivalent effect. A few days later, Hayden repeated his plea to amend the bill "by limiting the area to be furnished with water in any one ownership to 160 acres and requiring all excess lands to be sold at an approved price." 69 *Cong. Rec.* 9451; LX-DD(N).

Likewise Senator Ashurst continued his attack on the absence of an acreage limitation provision. On the floor of the Senate he repeated the objections contained in his minority report on S. 728, calling attention to the omission from the bill of the acreage limitation provision he had offered in Committee. 69 *Cong. Rec.* 10472, 10495; LX-CC(P), (Q). During the second session, a few days before ultimate passage of the Act, Ashurst repeated the same objections in another speech on the floor of the Senate. 70 *Cong. Rec.* 289; LX-DD(S).

The House passed Swing's H.R. 5773 (including the Leatherwood acreage limitation proviso) before the Senate completed action on S. 728. When H.R. 5773 was called up in the Senate, Senator Johnson moved to substitute the text of S. 728 (which contained no acreage limitation provision) as an amendment in the nature of a substitute for H.R. 5773. LX-Q. This motion carried, thereby deleting the express acreage limitation originally proposed by Congressman Leatherwood.

While it is true, as Senator Johnson said that S. 728 and H.R. 5773 were similar bills having " 'like purposes' and

'like designs' " (559 F.2d at 534), it is plain from the record that the Senate did not view S. 728 as identical in effect to H.R. 5773. Moreover, after the substitution of S. 728, Senator Ashurst renewed his protest that the bill would not apply acreage limitations to private landowners in Imperial Valley. 70 *Cong. Rec.* 289. Under these circumstances, there can be no basis for assuming that Congress viewed the omission of H.R. 5773's acreage limitation provision from the final Act as meaningless. On the contrary, in both Houses, Congress had always been told that the Act would not apply acreage limitation in the Valley absent an explicit provision. It strains credulity to assume that in the final days of the legislative proceedings, on a matter of intense importance, Congress silently acted on an assumption no one had ever before suggested.

B. The Legislative History Confirms that the Section 1 and Section 4(b) References to Reclamation Law Repayment Were Not Intended to Apply Acreage Limitation.

As previously discussed, the references in §§ 1 and 4(b), to "payment . . . in the manner provided by the reclamation law," can reasonably be construed to refer only to the terms of payment and fiscal conventions specified in the reclamation law. It has been pointed out that only such an interpretation gives meaning to each word of the section, since § 4(b) treats the mechanism for securing repayment ("contract or otherwise") separately from the repayment terms, and the reference to reclamation law applies only to the latter subject. *See,* pp. 37-39, *supra.* The legislative history of the evolution of §§ 1 and 4(b) confirms that the references to reclamation law contained in these sections were simply intended to specify the financial terms for repayment, and had nothing to do with acreage limitation.

Originally, § 4(b) merely required the Secretary of the Interior to make provision for revenues sufficient to pay for all the project works within 50 years. LX-Q, pp. 5-6. According to the financial projections, the revenues from power generation at the dam would have been sufficient to meet this requirement. Some in Congress were not willing

to have this happen, but wanted the farmers in Imperial Valley to pay for the canal. To overcome this objection, the Senate Committee amended the committee print of the last Johnson bill, adding to § 1 the following words:

> "The expenditure for such main canal and appurtenant structures to be reimbursable as provided in the reclamation law." *S. Rep. No. 592,* 70th Cong., 1st Sess. 1 (1928).

When the bill reached the floor, Senator Pittman explained the intent of this reference to reclamation law as follows:

> "MR. PITTMAN. . . . The intent of the amendment referred to, and which has been accepted by the Senator, is not to have the cost of construction of the All-American Canal a charge upon the assets received from the generation and sale of electrical energy at the dam." 70 *Cong. Rec.* 72.

A few days later, Senator Pittman proposed making a similar change in the wording of § 4(b):

> "Mr. PITTMAN. Now, Mr. President, in order to make the bill harmonious, having segregated the All-American Canal . . . from the Boulder Dam, the Black Canyon Dam, and the power-house project, it is essential to make subdivision (b) in Section 4 . . . conform to that. . . ." 70 *Cong. Rec.* 576.

Senator Pittman thereupon proposed an amendment to § 4(b) that would have required the Secretary to:

> "Make provision for revenues, by contract or otherwise, for the *storage of water and for the delivery thereof . . . in accordance with the provisions of the Reclamation Act,* adequate to ensure payment . . . *in the manner provided by the Reclamation Act.*" LX-CZ.

As is apparent from the language emphasized, the Pittman amendment would have referred to reclamation law twice, and in such a way as to provide *both* that delivery of water *and* the conventions for repayment would be governed by reclamation law. The introduction of Pittman's

amendment evoked an objection from Senator Johnson. 70 *Cong. Rec.* 526; LX-DD(T). On the next day, Pittman reread his amendment, and changed it to omit the language requiring that storage and delivery be "in accordance with the provisions of the Reclamation Act." *See* 70 *Cong. Rec.* 577; LX-DD(U). Senator Johnson obtained Pittman's confirmation that the reference to reclamation law governing delivery of water had been deleted, and then withdrew his objection. *Id.* As so changed, the amendment was adopted.

The significant point here is that when an amendment was offered that would have required the Secretary to provide for the storage and delivery of water "in accordance with the provisions of the Reclamation Act," the sponsor of the bill objected to such amendment, and the offending language was withdrawn. This, then, is clear evidence that the authors of § 4(b) acted to assure that the mention of reclamation law in that section refer only to the terms and fiscal conventions of repayment.

C. Overview of the Statute's Language and History.

In *Arizona v. California,* 373 U.S. 546 (1963), the Court observed that the "meaning and scope" of the Project Act "can be better understood when the Act is set against its background." *Id.* at 552. That background involved issues of interstate and international consequences quite different from the undertakings that had characterized the reclamation program up through 1928. Especially in the 1920's, the "unique size and multistate scope of the Project" was unprecedented. *See California v. United States,* 438 U.S. 645, 674 (1978). Imperial Valley, too, was then, as it is now, unique. This is and was especially true with regard to Imperial's fully developed and operating irrigation system. Apart from the respect that Congress accorded to Imperial's accomplishment, it is plain that the legal and legislative environment of the 1920's fostered an attitude of deference to Imperial's existing rights. As Senator King had said at one point, "[i]t might be questionable whether we have the power to impose a charge on them for the use of water." 70 *Cong. Rec.* 528.

So much has changed since the 1920's that it is difficult, if not entirely impossible, to deduce today the state of mind that legislators were likely to have had some 50 years ago. The objective evidence of what people of the same time thought the statute meant, therefore, comes with a stamp of accuracy that is not to be lightly ignored. Porter Dent, the Bureau's Chief Counsel and the real source of the original interpretation of the Project Act, did not suffer from the disability of trying to recreate the thinking of a legislature 50 years before his time. Dent was acting in the same times and environment as the legislators who had adopted the Project Act. Likewise, Reclamation Director Davis and Commissioner Mead were contemporaries of the events, and full-time professionals of long standing in the federal reclamation program. When they told Congress what reclamation practice was or how language would be interpreted, their views reflected the understanding of the day. Their analysis was not subject to the risk of distortion from subsequent events that threatens *de novo* analysis today. In *California v. United States,* the Court stressed the practical truth that the history, policy and expectations of all concerned would have been much fresher in the minds of those then in Government than it is to us today. 438 U.S. at 648. The same truth is just as obvious here. Deference is due the construction placed on the Project Act by Porter Dent, and even before him by everyone within the Bureau of Reclamation who had given attention to the matter (LX-AM-p. 2), because that construction is likely to be the correct one. That likelihood is all the greater in view of the total absence of contemporary disagreement or criticism. Dent's interpretation was not only approved and published by Secretary Wilbur, it was knowingly followed and used by his immediate successor, Secretary Ickes, and made the basis of the Government's commencement of the construction of the All-American Canal. This contemporary acceptance of the Act's meaning cannot be rationalized away, even if it would appear to present-day eyes that a different reading would be wise or preferable.

Accuracy, however, is only one compelling reason for deference to the original practice. Fairness and practicality are equally important. In *Tallman,* the Court noted that private reliance was one of the important reasons for adhering to an established administrative construction, and that in the face of such reliance "[i]f . . . the Secretary's interpretation is not *un*reasonable," it must be upheld. 380 U.S. at 17-18. The fact of long and justifiable reliance cannot seriously be questioned here, especially in light of the express confirmation in *Hewes v. All Persons* that no provision of federal law called for imposition of acreage limitation in Imperial Valley. *See pp. 60-61, infra.*

Reliance is not the only consideration of practicality dictating adherence to the longstanding interpretation of the Project Act. The simple truth is that none of the goals that might have been argued in 1928 as a basis for imposing acreage limitation in Imperial Valley can be achieved in this case or at this time. If the purpose of an acreage limitation is to promote settlement and family farms, that purpose was never intended to be achieved by disrupting settled communities or forcing people to give up the results of a lifetime or even of generations of family farming. If acreage limitation is meant to prevent speculation, forcing those who purchased their lands at market prices during the intervening years to sell now at prices drastically below market values is to *create* an opportunity for speculation, not to prevent it. Finally, if the purpose of acreage limitation is supposed to be a "breakup" of pre-project ownerships, the record makes it clear that such purpose cannot now be served. Those who were "pre-project" owners have long since passed from the scene. Today's farmers, like petitioners, have acquired their lands over the years since 1933. Forcing a "breakup" today is nothing less than to require those people who have made a success of their farming careers to forfeit the reward of those labors. Instead of making the federal cooperation in the irrigation undertaking a guarantee of opportunity, it would be made an arbitrary punishment for success.

The foregoing review of the statute and its history makes it clear that the original interpretation of the Project Act published by Secretary Wilbur cannot be found unreasonable. Wilbur's interpretation comports with the

statutory language and is virtually compelled by the legislative history. The arguments against it are weak and technical. More importantly, they are inevitably colored by developments in the law and government that long postdate the enactment in question. It is precisely in this regard that the rule of *Tallman* serves its best purpose. There is no need to trouble over *how* reasonable Wilbur's original interpretation of the Project Act was. It certainly cannot be found *un*reasonable, and that ends the need for further inquiry.

IV. THE NINTH CIRCUIT'S REFUSAL TO HONOR THE STATE-COURT CONFIRMATION JUDGMENT IN *HEWES v. ALL PERSONS* VIOLATED FUNDAMENTAL PRINCIPLES OF RECLAMATION LAW AS WELL AS THE DUTY TO ACCORD THAT JUDGMENT FULL FAITH AND CREDIT.

The fundamental issue here — whether acreage limitation applies to Imperial Valley — was litigated in a proceeding required by the Government and designed to resolve all issues that could affect the validity of the All-American Canal Contract. That proceeding, *Hewes v. All Persons,* resulted in a final judgment that acreage limitation did not apply. In rejecting that holding, the Ninth Circuit disregarded not simply the judgment, but California's entire process governing irrigation district contracts. In effect, the decision of the court below would impose upon Imperial Valley a new contract never approved in accordance with state law. Such result directly contravenes a strong federal policy of deferring to the form and the substance of state water law procedures. Moreover, the Ninth Circuit worked that breach of federal policy, by failing to meet its equally fundamental obligation to accord the *Hewes* judgment full faith and credit.

It is undisputed in this case that the All-American Canal Contract does not, by its terms, call for acreage limitation. This absence is not a result of accident or oversight; the written contract accurately expresses the intention of the parties that acreage limitation would not be imposed.

3 Tr. 221, 240-41 (Weinberg). As Secretary Wilbur said, "early in the negotiations connected with the All-American Canal Contract, the question was raised regarding whether and to what extent the 160-acre limitation is applicable to land to be irrigated from this canal. Upon careful consideration, the view was reached that this limitation does not apply to lands now cultivated and having a present water right." LX-AO, Con. Apx. 177a.

Another indisputable principle in this case is the fact that federal law required that the All American Canal Contract be entered in compliance with procedures specified by California law. Project Act § 18; 43 U.S.C. § 617q. At the relevant time, California law mandated elaborate procedures to be followed.[37] In addition to the usual requirement that the contract be approved by the District's board of directors, it had to be approved at a general election of the District, and its validity had to be confirmed by judicial decree in an action in which *any* interested person was entitled to be heard.

As certain as the foregoing is the fact that the All-American Canal Contract of December 1, 1932 was entered in scrupulous compliance with the applicable California law. Article 31 of the contract explicitly required the election and confirmation proceeding mandated by California statute. LX-AD, pp. 29-30. The Government not only obligated the District to take these steps, it assiduously monitored their progress, and in the confirmation action, its officers continually advised and counseled the district's lawyer. LX-AP, AR.

The decision below purports to create an entirely different contract by main force. The happenstance that the decision creating that contract violates elementary principles of the law of *res judicata* should not be allowed to obscure the fact that the Ninth Circuit's decision was far

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37. *See* California Irrigation District Act of 1917, 1917 Cal. Stat. 243; California Irrigation District Act of 1897, 1897 Cal. Stat. 254.

more than the abrogation of the *Hewes* judgment. Separate from that error, the Ninth Circuit's decision purports to create a new contract binding on Imperial Irrigation District despite the fact that the steps mandated by the California irrigation district law have never been (and as a practical matter, cannot be) taken. This end run of the terms and purposes of California law violates the clear congressional purpose of deference "to the substance as well as the form of state water law." *See, California v. United States,* 438 U.S. at 675. Even if *res judicata* were not applicable, the long-standing federal policy of compliance with state water law precludes imposition of acreage limitation where the Government knowingly negotiated a contract that intentionally excluded acreage limitation, where that contract has long since become final under state procedures endorsed and adopted by federal law, and where the contracting district has irrevocably lost those practical alternatives that Congress did not intend to take from the district without its agreement.

With good reason, California and most irrigation states mandate these elaborate procedures to insure in every possible way that an irrigation district's water service contract will be fixed, final and thereafter immune from public or private interference. The need for these protections is obvious. Usually, such contracts form the basis for the economy of an entire region. Inevitably, people will accommodate their lives, their businesses and their estate plans to the conditions resulting. Banks and other financial institutions will loan large sums for land acquisition, improvements and equipment, all based on the stability of a farm economy based on the irrigation contract. Likewise, municipal governments, school districts and other public service agencies will be organized and financed in accordance with the status quo. Clearly, state government is concerned that irrigation district contracts not be entered against the will of the people affected, and that once entered, the effect of such contracts will be immune from disturbance.

The means chosen by California to secure these ends include a general election to approve the contract, followed by the requirement of an *in rem* confirmation judgment.[38] Congress has explicitly embraced the use of confirmation actions to finalize Bureau of Reclamation contracts. The Act of May 15, 1922, for example, authorizes irrigation district contracts, but provides that such contracts are not binding upon the Government "until the proceedings on the part of the District for authorization of execution of the contract with the United States shall have been confirmed by a decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." 42 Stat. 541, 43 U.S.C. § 511. In affirmatively claiming the benefit of state confirmation actions, Congress anticipated that *"all phases of the case"* would be "placed before the court for its consideration." 62 *Cong. Rec.* 3573. Inevitably, this expectation extended to issues of federal reclamation law, for the validity of such contracts could scarcely be determined without determination of reclamation law questions. Consistent with this expectation, the most important cases defining the requirements of federal law in the reclamation field have been confirmation actions. *E.g., Ivanhoe Irr. Dist. v. All Parties,* 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd. on other grounds, Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958); *In re Owl Creek Irr. Dist.,* 71 Wyo. 30, 253 P.2d 867, *on pet. for reh.,* 258 P.2d 220 (1963); *McLean v. Truckee Carson Irr. Dist.,* 49 Nev. 278, 245 Pac. 285, 288-89 (1926); *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 Pac. 663 (1913); *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 Pac. 382, 383 (1913).

The history of *Hewes v. All Persons* demonstrates in the concrete the active federal utilization of state confirmation proceedings to secure certainty and finality in irrigation district contracts. Article 31 of the contract provided that "the United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision pending appellate

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38. *See* Cal. Water Code, §§ 23220 *et seq.*

action if ground for appeal be laid." Pl. Ex. 8, p. 25.[39] After such proceedings were initiated, the Bureau actively collaborated in carrying them forward. Commissioner Mead instructed the Bureau's district counsel to assist counsel for the irrigation district in prosecuting *Hewes*. Bureau officials in Washington conferred with District leaders as the suit advanced. *See*, LX-AP, LX-AR. District counsel for the Bureau kept the Commissioner informed of the progress of the suit, including the unfolding of Malan's allegations on acreage limitation. LX-AU, LX-AV, LX-AW, LX-AX, LX-BA, LX-BD, LX-BF, LX-BG, LX-BJ. The Comptroller General of the United States insisted that the judgment in *Hewes* become final before the federal government would act pursuant to the contract. LX-BH. And indeed, at this phase of the case, Malan's counsel presented his acreage limitation arguments directly to Harold Ickes, the new Secretary of the Interior. LX-BK. Finally, predicated on the finality of *Hewes* and the validity of the contract, the Department of the Interior sought appropriations from Congress to begin construction of the All-American Canal.

The judgment in *Hewes* was clearly grounded on an adjudication of the acreage limitation issue. Rejecting landowner Malan's attack on the validity of the contract, the court ruled that neither the contract nor "any law applicable thereto" limited "the delivery of water to any maximum

39. Although this language in Article 31 is similar to the language of § 1 of the Act of May 15, 1922 (43 U.S.C. § 511), the Contract's provision for judicial confirmation was not a requirement imposed by that Act. Rather, § 18 of the Project Act required compliance with state procedures, and California law required the confirmation action. As Commissioner Mead explained to Congress, the contractual requirement for judicial confirmation was "necessary under California law." *Hearings on H.R. 13710*, Sen. Subcomm. on Appropriations, 72nd Cong., 2nd Sess. 97 (1933).

acreage of land in a single ownership".[40] Under California law, the final judgment based on this holding bars relitigation of the validity of any issue properly considered. It forecloses "further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it

40. In its written opinon, the *Hewes* court stated:

> "Defendant Malan, the owner of 210 acres of land in Imperial Irrigation District, asserts that the contract is void because section 5 of the Reclamation Law provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner. . . .
>
> ". . . [S]*ection 5 of the Reclamation Law does not apply* in these proceedings. The Boulder Canyon Project Act provides a complete scheme for the construction of the Boulder Dam, the All-American Canal, and the dam diverting water from the Colorado River into the canal. . . . [T]he authority of Secretary with reference to delivery of water must be found in the Boulder Canyon Project Act and not in the Reclamation Law. Section 5 of the Boulder Canyon Project Act authorizes the Secretary to contract for the delivery of water 'under such general regulations as he may prescribe' and provides that 'contracts respecting water for irrigation and domestic uses shall be for permanent service. . . .' There is nothing in the statute or in the contract limiting the acreage to which water may be sold and delivered." LX-AZ, pp. 23-24 Pet. Apx. 124a-125a.

Similarly, in its Findings of Fact and Conclusions of Law, the court stated:

> "FINDING NO. 35
>
> "That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.
>
> ". . .
>
> "[CONCLUSION OF LAW] XI
>
> "That neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land in a single ownership." LX-BC, pp. 26, 32.

. . . [is] binding on the world at large. *Ivanhoe Irr. Dist. v. All Parties,* 47 Cal. 2d 597, 606; 306 P.2d 824, 829 (1957).

In order to avoid the *Hewes* judgment, the Ninth Circuit did not, and could not, deny the power of state courts to adjudicate federal questions, or reclamation law questions in particular.[41] Nor could it contest the fact that a confirmation proceeding, such as *Hewes,* results in an *in rem* judgment binding upon the world, including respondents. But, while paying lip service to the law of judgments, the court asserted that the *Hewes* court's ruling on the inapplicability of acreage limitation was "pure dicta" only "incidental and collateral" to the confirmation judgment. 559 F.2d at 526. This is so, according to the panel's opinion, because:

> "A decision that the Project Act incorporates the acreage limitation on private lands of the reclamation law into the contract would not make the contract invalid under federal law, *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed. 2d 1313 (1958), or California law. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1960)." *Id* at 525-26; Pet. Apx. 24a.

This hypothesis is dead wrong in its characterization of federal law and in its characterization of state law; moreover, it is a gross misapplication of the law of judgments.

First, as to federal law, the contract as written and approved by the voters deliberately omitted any acreage limitation and divestiture provisions. If the state court had concluded (consistent with the opinion of the court below) that the Project Act requires imposition of acreage limitation laws, the contract's intentional exclusion of § 46 acreage limitation provisions would have rendered it invalid

41. *E.g., Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 287 (1958); *Grubb v. Public Utilities Comm'n,* 281 U.S. 470, 476 (1930); *PI Enterprises, Inc. v. Cataldo,* 457 F.2d 1012, 1014-15 (1st Cir. 1972); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 325 (6th Cir. 1967); *Brown v. Chastain,* 416 F.2d 1012, 1014 (5th Cir. 1969).

under federal law for failure to comply with the statutory mandate.[42]

Second, as a matter of state law, it is clear that if the *Hewes* court had found that acreage limitations were mandated by the Project Act, it could not have implied such provisions into the contract because neither the District nor its voters had ever approved any such contractual obligations. The only action proper for the *Hewes* court would have been rejection of the original contract, leaving the District with the option of negotiating a new contract with express acreage limitation provisions which would then have to be submitted to the voters of the District for approval.[43]

Third, the Ninth Circuit's rationalization for labelling the *Hewes* decision "pure dicta" is patently contrary to the law of judgments. Even assuming that the inference drawn by the court from *Ivanhoe* were correct, the fact of the matter is that the *Ivanhoe* decision was not rendered until 1960. In the absence of any controlling authority, the *Hewes* court was free to conclude that application of acreage limitations would render the contract *invalid* under

42. Any inconsistency between the Project Act's requirements and the contract would have required the state court to declare the contract invalid. Thus, it was required to decide, in addition to the acreage limitation question — whether the terms of § 4(a) of the Project Act had been satisfied, LX-AZ, pp. 6-10; the legality under § 9 of the Project Act of the provisions in Article 23 of the contract regarding entry of public lands, LX-AZ, p. 26; the legality under § 4(a) of the Project Act of exclusion of any provision for construction of a canal to the Coachella Valley, LX-AZ, p. 28; and the applicability of § 4 of the 1902 Act, LX-AC, p. 31.

43. Needless to say, the requirement to comply with the state-law election procedure in the event of a change in the contract term was also imposed by § 18 of the Project Act which requires compliance with state laws. 43 U.S.C. § 617q. The federal government has never imposed an irrigation arrangement upon farmers without their consent. Thus, at the time, the Bureau's district counsel advised his superiors that any amendment of the All-American Canal Contract would require a new election to allow the District's voters to pass on such new terms. LX-BJ, p. 2.

state or federal law.[44] And in that event, a decision 25 years later would provide no basis whatsoever for attacking the state's court judgment. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *United States v. Moser*, 266 U.S. 236 (1924).

At bottom, the *Ivanhoe* case is proof of the error of the Ninth Circuit's proposition that acreage limitation issues are outside the legitimate scope of confirmation proceedings. *Ivanhoe* involved three confirmation cases which had been brought in state court under the same jurisdictional statute as *Hewes*.[45] The California courts had sustained objections made by dissident landowners challenging the applicability of acreage limitations, and had declared the contracts invalid under both federal and state law. On certiorari, this Court reversed, holding that under federal law acreage limitations were valid, and remanded the case to the California Supreme Court for a determination of the legality of such limitations under state law. Clearly, this Court, the California Supreme Court and the two trial courts in California were not engaged in a meaningless exchange of dicta which would have no binding effect. And just as clearly, neither was the *Hewes* court engaging in a frolic of dictum when it adjudicated Malan's claim in 1933.

V. RESPONDENTS LACK STANDING

Under *Warth v. Seldin*, 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Org'n*, 426 U.S. 26 (1976), Article III standing requires a showing that persons who would invoke federal judicial power have sustained a "particularized injury" that resulted "in a concretely demonstrable way" from the violations alleged. 422 U.S. at 504. The alleged injury must be "distinct and

44. According to Malan's brief to the California Supreme Court in *Hewes*, the District conceded that the contract as written would be *invalid* if federal law required acreage limitation. LX-BK, p. 19.

45. *Ivanhoe Irr. Dist. v. All Parties*, 47 Cal.2d 597, 306 P.2d 824 (1957); *Madera Irr. Dist. v. All Persons*, 47 Cal.2d 681, 306 P.2d 886 (1957); *Santa Barbara County Water Agency v. All Persons*, 47 Cal.2d 699, 306 P.2d 875 (1957).

palpable" (*id.* at 501) and it must be shown that "the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

When they moved to intervene to perpetuate this litigation after the Government's decision not to appeal, respondents failed to allege or offer evidence of any facts establishing a basis for standing. They filed ten short affidavits, each averring as follows:

> "I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District." I-CR 172, *et seq.*; Con. Apx. 327a, *et seq.*

An additional affidavit, that of respondent Yellen, asserted that "if the government had prevailed in this litigation the Applicants and persons similarly situated would *attempt* to purchase . . . the excess lands." I-CR 170. Yellen also averred that irrigated land in the District has a value of "$1,200.00 to $1,400.00 per acre", but "without water" could sell "for approximately $25.00 to $50.00 per acre." *Id.*[46]

46. Respondents also alleged that they were plaintiffs in a separate lawsuit, *Yellen v. Hickel*, which had been filed on May 1, 1969 and was pending before a different judge in the same district. In that action respondents sought a writ of mandamus requiring the Government to impose in Imperial Valley a provision in § 5 of the 1902 Act, which forbids the sale of individual water rights to any landowner who is not an "actual bona fide resident on such land." 43 U.S.C. § 431. On September 27, 1972, while the appeal from the order denying intervention in this case was still pending, a decision in respondents' favor was entered in the *Yellen v. Hickel* case, 352 F.Supp. 1300 (S.D. Cal.). An appeal had been taken in *Yellen v. Hickel* by the time a panel of the Ninth Circuit heard argument on the intervention issue in this case. In its August 6, 1973 order granting intervention in this case, the Ninth Circuit panel explained that it was allowing intervention to avoid the possibility of a final judgment on appeal in *Yellen v. Hickel* which would be inconsistent with a final judgment of the trial court in this case. Such potential inconsistency,

These conclusory averments, unsupported by factual detail, establish at most no more than a "generalized grievance shared . . . by . . . a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499. *Warth* is instructive on this point. There the plaintiffs based their standing on the contention that they had been unable to buy homes in the village of Penfield because the price of houses had been inflated due to allegedly restrictive and discriminatory practices followed by the village. They alleged that each had made specific, concrete efforts to purchase, and that their efforts had proven fruitless because the prices in Penfield were greater than they could afford. 422 U.S. at 503. This Court held that such facts did not establish a "particularized injury." Clearly, respondents in this case have shown even less in the way of "particularized injury." The unsuccessful plaintiffs in *Warth* were at least able to show specific instances of unsuccessful attempts to buy property. Here, respondents did not ever attempt to buy farmland in the Valley. There is no evidence or finding that any respondent was ever thwarted in efforts to buy farmland because of conditions attributable to the fact that acreage limitation was not imposed in 1933 or thereafter. Respondents' alleged desire to buy land in Imperial Valley at less than market price is thus no more than a commonly held sentiment, falling far short of the "distinct and palpable injury" that is

the panel explained, could only be avoided by creating a means for appellate review in both cases, and the only way to achieve that was to permit appellants to intervene to prosecute an appeal in this case. 559 F.2d at 543-44, Pet. Apx. 56a-57a. The panel did not consider whether respondents had met the minimum requirements for intervention specified in Rule 24 F.R.C.P., or whether the requirements for standing under Article III had been satisfied.

The court below heard consolidated argument on the merits in both this case and *Yellen v. Hickel.* The court first decided that plaintiffs lacked standing in *Yellen v. Hickel,* and that holding *ipso facto* eliminated the possibility of any inconsistency between a final judgment in *Yellen v. Hickel* and the trial court's judgment in this case. Thus, the only claimed reason for allowing intervention in this case disappeared. The court below ignored this fact and, then, inexplicably held that respondents have standing in this case notwithstanding their lack of standing in *Yellen v. Hickel.*

a prerequisite to the exercise of judicial power under Article III. *Warth v. Seldin*, 422 U.S. at 501.

In addition to their failure to show a particularized injury, respondents also failed to show that any relief sought from the court would in fact redress their claimed injury. Here again, *Warth* is instructive, for it emphasizes that there must be "an actual casual relationship" between the alleged wrong and the asserted injury such that the purported litigant "would benefit in a tangible way from the court's intervention." 422 U.S. at 507, 508. The Court in *Warth* emphasized that the record there was devoid

> "of any indication that [any contemplated housing project] would have satisfied petitioners' needs *at prices they could afford,* or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary — that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Id.* at 506.

Here, too, the record is devoid of any indication that enforcement of acreage limitation would result in gratification of respondents' amorphous desires to own land. As in *Warth*, respondents have not shown what prices they could afford. And whatever those prices might be, there is no showing that respondents could afford or would in fact pay such prices.[47] Whether tangible gratification of

47. While respondent Yellen averred that land without water would have a value of $25.00 to $50.00 per acre, the record clearly establishes that the owners of farmlands in the Valley have spent upwards of $200.00 per acre for the installation of elaborate subsurface tile drainage systems required to keep the land from becoming salt poisoned. *E.g.,* 4 Tr. 360. Even if these lands were appraised for § 46 divestiture at "preproject" dryland values, the appraised prices would have to include at least the cost of such permanent improvements. The record is devoid of any evidence that respondents could afford such prices, and, as in *Warth,* respondents' descriptions of their financial situations suggest that they could not afford such prices.

respondents' desires to own land would ever result from imposition of acreage limitation is, at most, sheer speculation. *Cf. Bowker v. Morton*, 541 F.2d 1347, 1350 (9th Cir. 1976).

The court below attempted to gloss over these glaring deficiencies in respondents' case by asserting that *if* respondents were to buy land in Imperial Valley today they would have to pay prices higher than they would pay if § 46 were applied to the private landowners in the area. 559 F.2d at 552, Pet. Apx. 16a. Thus, the court of appeals concluded that respondents' standing can be predicated solely on an interest in seeing land prices reduced generally, without requiring any proof of respondents' ability to purchase at those unspecified lower prices. The court characterized respondents' interest as "an interest only in reducing land prices, not an interest in reducing land prices to any specific level." *Id.* That reasoning flies directly in the face of this Court's holding in *Warth v. Seldin* that standing cannot be established by the mere allegation of an interest in seeing current market prices reduced.

Clearly, respondents do not have the sort of personal stake in this controversy that is needed to satisfy the test of standing. The record is devoid of any indication that any respondent "stand[s] to profit in some personal interest" from the outcome of this case. *Simon v. Eastern Kentucky Welfare Rights Org'n,* 426 U.S. at 39. They are seeking to invoke judicial power, not to redress demonstrably personal injury, but to obtain determination of a public issue. Such resort to the judiciary to obtain decision of "abstract questions of wide public significance" is precisely what the standing requirement of Article III is intended to prohibit. *Warth v. Seldin,* 422 U.S. at 500.

VI. CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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Nos. 79-421, 79-425, and 79-435

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN M. BRYANT, ET AL., PETITIONERS

v.

BEN YELLEN, ET AL.

STATE OF CALIFORNIA, ET AL., PETITIONERS

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IMPERIAL IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

BEN YELLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, ET AL., PETITIONERS

v.

BEN YELLEN, ET AL.

No. 79-425

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

BEN YELLEN, ET AL.

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

BEN YELLEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 559 F.2d 509. The opinion of the court of appeals denying the petitions for rehearing (Pet. App. 64a-77a) is reported at 595 F.2d 524. The opinion of the district court (Pet. App. 78a-111a) is reported at 322 F. Supp. 11.

The order of the district court denying the motion of respondents Yellen, *et al.*, for leave to intervene (Pet. App. 112a-115a) is unreported. The order of the court of appeals reversing the district court's order and allowing intervention (Pet. App. 62a-63a) is reported as an appendix to the opinion of the court of appeals at 559 F.2d 509, 543-544.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1977 (Pet. App. 1a). The petition for rehearing was denied on April 23, 1979 (Pet. App. 64a). On July 3, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari in No. 79-435 to and including September 14, 1979. On July 18, 1979, Mr. Justice Stevens granted similar extensions in Nos. 79-421 and 79-425. The petitions were filed on September 14, 1979, and were granted, and the cases consolidated, on December 3, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the general excess-acreage limitation of federal reclamation law (Section 46 of the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 649, 43 U.S.C. 423e) is applicable to private lands in the Imperial Irrigation District that receive federal project water pursuant to the Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1057, 43 U.S.C. 617 *et seq.*

2. Whether, as a matter of *res judicata* or comity, the 1933 decision of the California superior court in *Hewes* v. *All Persons* precludes consideration on the merits of the applicability of the excess-acreage limitation to private lands in the Imperial Irrigation District.

3. Whether respondents Yellen, *et al.*, who have an interest in purchasing excess lands for farming as provided in the federal reclamation law, had standing under Article III to prosecute an appeal from the adverse judgment of the district court.

STATEMENT

This case presents the question whether the general excess-acreage provision of federal reclamation law, which restricts to 160 acres the amount of private land held in single ownership that can receive water from a federal reclamation project, is applicable to the Imperial Valley. The court of appeals held that the Valley is subject to this acreage limitation pursuant to the Boulder Canyon Project Act of 1928. As a result, private landowners of more than 160 acres will no longer be entitled to receive federal project water for their excess lands unless they execute valid recordable contracts for the

sale of such lands under terms and conditions satisfactory to the Secretary of the Interior.

1. The Imperial Valley is located in southeastern California near the Mexican and Arizona borders. In its natural state, the Valley is an arid desert (Pet. App. 80a).[1] Through reclamation, however, it has become one of the richest and most productive agricultural areas in the United States.

The Imperial Irrigation District is the largest irrigation district in the country, with an annual agricultural production valued at more than $500,000,000 (125 Cong. Rec. S12573 (daily ed. Sept. 14, 1979) (remarks of Sen. Nelson); *id.* at S12574 (remarks of Sen. Dole)). The entire economy of the Valley is based on farming and related or supporting businesses (Pet. App. 18a-19a; *Yellen* v. *Hickel*, 352 F. Supp. 1300, 1316 (S.D. Cal. 1972), vacated on grounds of standing, 559 F.2d 509 (9th Cir. 1977)). The population of the Valley in the 1950's was about 75,000 people (352 F. Supp. at 1316) and, in 1966, immediately prior to the commencement of this action, approximately 438,000 acres in the Valley were irrigated with federal project water; at that time, some 800 owners, with a total of 233,000 acres, held land in excess of 160 acres (Pet. App. 17a, 79a, 83a).[2]

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[1] "Pet. App." refers to the Appendix to the petition in No. 79-435.

[2] Of course, each of these owners is entitled to hold 160 acres to be irrigated by project water, and thus in 1966 the excess acreage amounted to approximately 105,000 acres.

More recent data (which, we are advised, were prepared by the District based on Department of Agriculture statistics) indicate that the largest ownership in the Valley consists of 15,000 acres; that there are 973 farms in the Valley, of which 103 exceed 1280 acres, 188 exceed 640 acres, and 275 exceed 320 acres; that, of a total number of 3752 ownerships (as distinguished from farm operations), 1.8% of the ownerships exceed 1280 acres and 5% exceed 640 acres; that farms in excess of 1280 acres account for more than 60% of the farm land, while farms in excess of 640 acres account for more than 78% of the farm land; and that the average farm size is 82 acres. See 125 Cong. Rec. S12571-S12572 (daily ed. Sept. 14, 1979) (remarks of Sen. Nelson); *id.* at S12573 (remarks of Sen. Hatch); *id.* at S12574 (remarks of Sen. Dole); *id.* at S12575 (remarks of Sen. Cranston). From these data, it appears that relatively few owners in the Valley hold excess acreage but that such holdings constitute a predominant portion of the farm land in the area.

2. As early as the mid-nineteenth century, it was recognized that water could be diverted from the Colorado River and delivered by gravity flow to the Imperial Valley, which is almost entirely below sea level. The California Development Company, a private corporation, was organized in 1896 to undertake this diversion of water to the Valley. The water was diverted from the River just north of the boundary between the United States and Mexico and carried by canal to the Valley. The canal ran through Mexico for approximately 50 miles along the dry bed of the Alamo River, and accordingly was called the Alamo Canal. The first water was diverted from the Colorado River to the Valley in 1901. By 1903, approximately 25,000 acres in the Valley were under irrigation (Pet. App. 2a-3a, 79a-81a).

In 1905, the Colorado River broke through its banks and flooded the Alamo Canal and the Imperial

Valley. The California Development Company was unable to control the River, and the flood threatened to destroy the entire valley.[3] The Southern Pacific Company, in order to protect the tracks of its railroad, subsequently advanced funds to assist the water company in its effort and took back a controlling interest in that company as security.[4] The Southern Pacific eventually returned the River to its channel and closed the breach in the banks. In 1916, the Southern Pacific foreclosed on the California Development Company's interests and, in June of that year, transferred those interests to the Imperial Irrigation District. In 1922-1923, the District acquired the seven mutual water companies that had been established by the California Development Company, and since that time it has been solely responsible for the diversion, transportation, and distribution of water from the Colorado River to the Imperial Valley (Pet. App. 3a, 81a-82a).

3. Diversion of water from the Colorado River continued to present difficult problems for the Imperial Valley. The possibility of flooding was a persistent concern, and constant effort was needed to control the River. The River, with its erratic flow, was also an undependable source of water, and there

[3] In the process, the flood created the Salton Sea, which previously had been a virtually dry area 273 feet below sea level and which after the flood had a surface area of 330,000 acres at an elevation of 190 feet below sea level (Pet. App. 82a).

[4] The Southern Pacific was later reimbursed by the United States. See Act of May 26, 1924, ch. 192, 43 Stat. 171.

were recurring shortages at certain times of the year. In addition, erosion of the soil and the deposit of silt fouled the water, blocked irrigation works, and damaged the land and crops in the Valley. Finally, unauthorized appropriations of water were occurring in Mexico, and there was concern that the very security of the Canal was in the control of a foreign country. Solution of these problems through the efforts of local groups and individual states proved impossible (Pet. App. 3a-4a; *Arizona* v. *California*, 373 U.S. 546, 553-554, 579, 588 (1963)).[5]

After protracted consideration between 1922 and 1928, Congress enacted the Boulder Canyon Project Act of 1928. At the time, the Boulder Canyon Project was the largest reclamation project ever undertaken in the United States (69 Cong. Rec. 7245, 7248 (1928) (statement of Sen. Johnson)). The Act authorized the construction of the Boulder (now Hoover) Dam and related facilities, and also provided for a canal to be built entirely in the United States—thus called the All-American Canal—to carry water to the Imperial and Coachella Valleys. The Act became effective in 1929,[6] and construction of

[5] At this time, there also arose the broader issue of the proper distribution of water from the Colorado River among the several western states. This issue was addressed in the Colorado River Compact of 1922 (Pet. App. 3a-4a, 82a & n.1; 373 U.S. at 555-559).

[6] In 1929, the population of the Imperial Valley was approximately 60,000 people (*Yellen* v. *Hickel*, 352 F. Supp. 1300,

the Dam was completed in 1935. The All-American Canal was begun in 1934, and delivery of water to the Imperial and Coachella Valleys commenced in 1940. Since 1942, the Valleys' entire water supply has been carried through the All-American Canal (Pet. App. 4a, 83a-84a; 373 U.S. at 560)

4. In 1932, as required by Sections 4(b) and 5 of the Project Act, the Secretary of the Interior and the Imperial Irrigation District entered into a contract for the delivery of project water to the District and the repayment by the District of charges for constructing the Canal. Pursuant to Article 31 of the contract and applicable federal and state law, the District brought an action in state court to confirm the validity of the contract. *Hewes* v. *All Persons*, No. 15460 (Cal. Super. Ct., Imperial Valley, July 1, 1933) (Pet. App. 120a-154a). A companion case was also filed by Charles Malan, a private landowner in the Valley, who objected to the contract on the ground that project water would not be furnished to his land in excess of 160 acres. The California superior court, considering *Hewes* and *Malan* together, confirmed the validity of the contract and stated that Malan's excess acreage would not be denied water from the Project.

5. In connection with the state-court litigation, Secretary of the Interior Wilbur, at the request of the Imperial Irrigation District, wrote a letter in

1316 (S.D. Cal. 1972), vacated on grounds of standing, 559 F.2d 509 (9th Cir. 1977)), and 424,145 acres in the Valley were in irrigated cultivation (Pet. App. 81a).

1933 stating that the excess-acreage limitation of Section 5 of the 1902 Reclamation Act was inapplicable in the District. In 1945, the Wilbur letter was criticized by Solicitor of the Interior Harper in a formal opinion that applied the excess-acreage limitation to the Coachella Valley of California, which, like the Imperial Valley, receives federal water under the Boulder Canyon Project Act. Secretary Krug in 1948, and Solicitor Bennett in 1958, declined to overturn the Wilbur letter, expressing the view that, regardless of the legal merits of the issue, it would be unfair to apply the excess-acreage limitation to the Imperial Valley. However, on two occasions in 1958, Solicitor General Rankin stated to this Court on behalf of the United States that the Valley was subject to the excess-acreage provision of reclamation law. In 1964, Solicitor Barry in a formal opinion expressly rejected the Wilbur letter and concluded that the excess-acreage limitation was applicable to the Imperial Valley (Pet. App. 48a-56a, 101a-109a; A. 181a-266a).[7]

6. Following the failure of negotiations between the United States and the District to amend the contract to reflect the Barry opinion, the United States in 1967 commenced this suit against the Imperial Irrigation District for a declaratory judgment that the excess-acreage limitation of Section 46 of the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 649, 43 U.S.C. 423e (Pet. App. 172a-173a), is applicable to

[7] "A." refers to the Appendix to the briefs on the merits in Nos. 79-421, 79-425, 79-435.

private lands in the Imperial Valley that receive federal project water pursuant to the Boulder Canyon Project Act of 1928. Several landowners, both individually and as representatives of all persons owning more than 160 acres of private land in the Valley, and the State of California were permitted to intervene as defendants (Pet. App. 79a). In 1971, the district court denied the government's request for relief (*id.* at 78a-111a; A. 317a-318a). The United States decided not to appeal. At the same time, Dr. Yellen and other residents of the Valley, who had participated as amici in the district court and who desired to purchase the excess lands, sought to intervene for purposes of appeal. The district court denied this motion (Pet. App. 112a-115a), but intervention was subsequently allowed by the court of appeals (*id.* at 62a-63a). In the ensuing appeal prosecuted by the intervenors, the court of appeals held that the intervenors had standing under Article III to seek review of the district court's decision; that the 1933 judgment of the California superior court in *Hewes* v. *All Persons* was not *res judicata* on the excess-acreage issue; that the language, purpose, and legislative history of Section 46 and the Boulder Canyon Project Act demonstrated that the excess-acreage limitation is applicable to the Imperial Valley; and that the Department's administrative practice between 1933 and 1964 did not bar application of the excess-acreage provision (*id.* at 1a-61a). The court of appeals thereafter denied petitions for rehearing, again finding that the intervenors had standing under Article III to pursue an appeal and also

holding that such standing did not abate upon repayment by the District of one-half of the construction charges for the All-American Canal (*id.* at 64a-70a).

SUMMARY OF ARGUMENT

I.

A.

From its enactment in 1902, the federal reclamation law has generally limited to 160 acres the amount of private land in single ownership that is eligible to receive water from a reclamation project. This excess-acreage limitation has "been national policy" since that time (*Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 292 (1958)) and "is, in every respect, the most important part of reclamation law" (2 R. Clark, *Waters and Water Rights* § 120, at 209 (1967)). The purposes of the excess-acreage limitation are both fundamental and well-established: to open lands to settlement by farmers of modest means and allow the establishment of family farms; to distribute widely the benefits of the federal reclamation project; and to prevent speculation and disproportionate gain by those who own or can acquire large holdings of land benefited by the project.

The excess-acreage limitation at issue in this case is contained in Section 46 of the Omnibus Adjustment Act of May 25, 1926 (43 U.S.C. 423e, Pet. App. 174a-175a), which provides that private lands held by one owner in excess of 160 acres shall not receive water from any federal reclamation project there-

after completed unless the owner executes a valid recordable contract for the sale of such excess lands under terms and conditions satisfactory to the Secretary of the Interior. On its face, Section 46 is applicable to the Boulder Canyon Project, which was authorized in December 1928. Accordingly, unless superseded by some other provision of law, the excess-acreage limitation of Section 46 governs the receipt of federal project water by private lands in the Imperial Irrigation District. And, as the Court noted in *Ivanhoe, supra*, "where a particular project has been exempted [from the general excess-acreage limitation] because of its peculiar circumstances, Congress has always made such exemption by express enactment" (357 U.S. at 292). If petitioners were to prevail, the Imperial Irrigation District would be the only instance in which a federal reclamation project has been exempted from the excess-acreage limitation by implication rather than by explicit congressional directive.

The applicability of the excess-acreage limitation of Section 46 to the Imperial Irrigation District is confirmed by Section 14 of the Boulder Canyon Project Act of 1928 (43 U.S.C. 617m, Pet. App. 166a), which states that the Act "shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Thus, Section 14 incorporates into the Boulder Canyon Project Act the general provisions of reclamation law, including the excess-

acreage limitation, "except as otherwise * * * provided."

Nothing in the Project Act precludes the applicability of the excess-acreage limitation to private lands in the Imperial Valley. Application of the excess-acreage limitation would not interfere with the satisfaction of present perfected rights based on prior use of water from the Colorado River, which rights are recognized in Section 6 of the Act (43 U.S.C. 617e, Pet. App. 162a-163a) as construed in *Arizona* v. *California*, 373 U.S. 546 (1963), decree, 376 U.S. 340 (1964), supplemental decree, 439 U.S. 419 (1979). The circumstance that the Imperial Valley had previously been under private irrigation does not distinguish the Boulder Canyon Project Act from most other federal reclamation programs, for, as the court of appeals found, "[i]t is usually true that private lands [in reclamation projects] are already under irrigation through facilities developed at private expense * * *" (Pet. App. 48a, quoting *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1143 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977)). Moreover, the doctrine of present perfected rights is designed to "fetter the Secretary's discretion" (*Arizona* v. *California, supra*, 373 U.S. at 581) by setting an " 'order of priority' " (*id.* at 583 n.84) in the allocation of water under the Project Act to those who are entitled to receive it. This limitation on the Secretary's authority does not decide the antecedent issue of eligibility to receive that project water in the first instance; instead, the terms and condi-

tions of eligibility are prescribed by Congress. Thus, Section 6 is simply immaterial to Congress' determination, in Section 46 of the Omnibus Adjustment Act and Section 14 of the Project Act, that excess lands shall not receive federal water. Finally, even if Section 6 were pertinent here, the present perfected rights recognized in the Act reside in the Imperial Irrigation District rather than in the individual landowners. Therefore, since it does not affect the total quantity of water available to the District, the 160-acre restriction on the lands held by each owner that can receive project water is not inconsistent with the satisfaction of present perfected rights.

Likewise, none of the other provisions of the Project Act suggests the inapplicability of the excess-acreage limitation to private lands in the Imperial Irrigation District. Section 1 of the Act (43 U.S.C. 617, Pet. App. 155a-156a), in providing that no charge shall be made for the use or delivery of project water in the District, does not indicate that the District is exempt from the excess-acreage limitation. Rather, this provision was intended only to avoid the possible unfairness of imposing a charge for water upon landowners who had a pre-existing right of use. Section 9 of the Act (43 U.S.C. 617h, Pet. App. 165a-166a) does not apply the excess-acreage limitation to public lands, but serves only to require the withdrawal from entry of such lands susceptible of reclamation and to limit their subsequent reopening to tracts not exceeding 160 acres in size. Finally, Section 4(b) of the Act (43 U.S.C. 617c(b), Pet. App. 158a-159a)

does not render the excess-acreage limitation inapplicable to the District. While Section 4(b) may differ from Section 46 in the particular provisions regarding the nature of the agreement with the Secretary for repayment of costs and delivery of water, the identity of the party to enter into the agreement on behalf of the landowners, and the time in which to execute the agreement, none of these variances bears on the excess-acreage limitation, and it is entirely feasible to comply with both the specific provisions of Section 4(b) and the excess-acreage provision of Section 46.

B.

The legislative history of the Boulder Canyon Project Act does not demonstrate a congressional intent that the excess-acreage limitation be inapplicable to the Imperial Valley. Given that Section 46, a provision of central importance to the reclamation law, had been passed less than two years before the Project Act, the exclusion of the Valley from the excess-acreage limitation would most likely have been the subject of extensive deliberation and thorough analysis in Congress. However, the excess-acreage issue arose at all on only a handful of occasions during the protracted six-year history of the Act, and none of these involved the careful consideration and extended debate that could be expected to accompany such a measure. This circumstance, by itself, makes it most improbable that Congress intended the excess-acreage restrictions to be inapplicable to the Imperial Valley.

At all events, a detailed examination of the legislative history fails to evince a congressional intent to exempt the Imperial Valley from the general excess-acreage limitation. In their final forms, both the House and Senate bills contained the provision now found in Section 14 that the Act is a supplement to the reclamation law and that the Project shall be governed by the reclamation law except as otherwise provided. The House bill also expressly provided that the excess-acreage limitation would be applicable, while the Senate bill did not. But this difference was not treated as a matter of substance. The House passed its version of the bill and sent it to the Senate. Senator Johnson, the sponsor of the Senate bill, explained that the House and Senate bills had "like purposes" and "like designs." 70 Cong. Rec. 67 (1928). The Senate ultimately passed its version of the bill, without the explicit excess-acreage provision. The Senate bill was then considered in the House. Congressman Swing, the sponsor of the House bill, urged that the Senate bill be passed, stating that "[t]he only differences [between the House and Senate bills], it seems to me, are matters relatively of small importance compared with the beginning of this great project." *Id.* at 833. The House accepted the Senate bill without any discussion of the omission of the express excess-acreage limitation contained in the bill it had previously adopted.

In our view, the legislative history suggests that Section 14 of the Project Act, which was found in all versions of the measure, was designed to incorporate

the excess-acreage limitation of federal reclamation law. At the least, this legislative history does not refute the conclusion, derived from the language of the statutes and the fundamental purposes of the reclamation law, that the excess-acreage limitation is applicable to the Imperial Irrigation District. Likewise, isolated statements in the Senate by opponents of the bill, based on their view that the Senate bill did not include the excess-acreage limitation, cannot serve to exempt the District from this basic provision of federal reclamation law.

C.

The past administrative practice of the Department of the Interior not to apply the excess-acreage limitation to the Imperial Valley does not exempt the Valley from the statutory limitation. The deference due the administrative interpretation of a statute "is constrained by * * * [the Court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 12. As discussed above, the language and purpose of the statutes, uncontradicted by the legislative history of the Project Act, establish that the excess-acreage limitation is applicable to the Imperial Valley and that the Department's prior position to the contrary was erroneous and unauthorized.

Moreover, the Department's practice in this regard is not sufficient to warrant deference by the Court. In a 1933 letter to the Imperial Irrigation District, Secretary Wilbur stated that the Imperial Valley was

not subject to the excess-acreage provision of the 1902 Reclamation Act. In 1945, Solicitor of the Interior Harper concluded in a formal opinion that the excess-acreage limitation of Section 46 of the 1926 Omnibus Adjustment Act was applicable to the neighboring Coachella Valley, which, like the Imperial Valley, receives water under the Boulder Canyon Project Act. In reaching this conclusion, Solicitor Harper rejected the approach previously taken by Secretary Wilbur and severely criticized the 1933 letter to the District. However, because the Wilbur letter was confined to the Imperial Valley and did not pertain to the Coachella Valley, it was not expressly overturned.

In 1948, Secretary Krug was requested to reconsider the Wilbur letter. Without addressing the merits of the issue, he decided not to disturb the Department's position "in fairness to those who have relied on * * * [the Wilbur letter], even though that action might now be subject to valid question" (A. 254a). A similar view was expressed in 1958 by Solicitor Bennett, who noted that he had "not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper" but that "[w]hatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so" (A. 255a). However, despite his awareness of Solicitor Bennett's view, Solicitor General Rankin in 1958, in connection with *Ivanhoe Irrigation District* v. *McCracken, supra,* and *Arizona* v. *California, supra,* twice argued on behalf of the United States that the

excess-acreage limitation was applicable to the Imperial Valley.

In 1964, Solicitor Barry undertook a thorough review of the excess-acreage issue concerning the Imperial Valley. After carefully considering the language and purpose of the relevant statutes, the legislative history of the Boulder Canyon Project Act, and the administrative practice with respect to the Imperial Valley, Solicitor Barry concluded in a formal opinion that the excess-acreage limitation was applicable to private lands in the Valley. In particular, Solicitor Barry criticized the Wilbur letter on several grounds and found that "[t]he interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress" (A. 210a). Solicitor Barry's opinion was accepted by the Department and has been consistently adhered to since that time.

Thus, throughout the period 1933-1964, the only basis for the Department's position on the excess-acreage issue was Secretary Wilbur's letter in 1933. Until Solicitor Barry's re-examination of the question in 1964, the Department either criticized the Wilbur letter but did not expressly overrule it, as in Solicitor Harper's 1945 opinion, or abided by the Wilbur letter for reasons other than its substantive validity, as in Secretary Krug's 1948 letter and Solicitor Bennett's 1958 memorandum. The correctness of the Wilbur letter has been soundly discredited by Solicitors Harper and Barry, and the Solicitor General on two

previous occasions has argued on behalf of the United States that the excess-acreage limitation does apply to the Imperial Valley. In these circumstances, the administrative practice is simply inadequate to offer controlling guidance on the excess-acreage issue.

II.

The 1933 decision of the California superior court in *Hewes* v. *All Persons*, which confirmed the contract between the Secretary and the District, does not as a matter of *res judicata* preclude consideration on the merits of the excess-acreage issue. The sole issue in the *Hewes* confirmation proceeding was the validity of the contract. Thus, when the court concluded that the limitation was inapplicable under the statutes, it impermissibly exceeded the bounds of its limited jurisdiction. Nor was this aspect of the court's decision necessary to its holding on the validity of the contract. The contract was silent on the applicability of the excess-acreage limitation, and hence disposition of the statutory question could not have rendered it invalid under either federal or state law.

Moreover, even if the 1933 judgment of the California superior court had properly decided the excess-acreage issue, it would not foreclose re-examination of the issue in this case. The preclusive effect of *Hewes* is governed by the "general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Insurance Co.* v. *Duel*, 324 U.S. 154, 162 (1945). Here, there have been a number of legal developments since 1933 that are pertinent to the proper resolution of the excess-acreage issue—for example, the Interior Department's continued consideration of the question, culminating in Solicitor Barry's formal opinion in 1964 that the excess-acreage limitation does apply to the District; this Court's unanimous decision in 1957 in *Ivanhoe Irrigation District* v. *McCracken*, *supra*, which explicated, in the context of a confirmation proceeding, the excess-acreage limitation and its effect on water rights vested under state law; the Court's decision and decrees in *Arizona* v. *California*, *supra*, involving the Boulder Canyon Project Act and the concept of "present perfected rights"; and the decision in *California* v. *United States*, 438 U.S. 645 (1978), on which petitioners rely (79-421 Br. 58; 79-435 Br. 29 n.20, 38) to support their view of both the paramount importance of vested rights in this area and the principle of deference under the reclamation law to state policies and procedures. It cannot reasonably be doubted that, whatever the ultimate outcome, such developments bear centrally on the excess-acreage issue presented in this case. Furthermore, application of the principle recognized in *Duel* is especially appropriate where, as here, the underlying substantive issue is of continuing public importance. Therefore, the 1933 decision in *Hewes* does not bar consideration of the excess-acreage issue on the merits.

III.

The private respondents, intervenors below and amici in the district court, had standing under Article III to seek appellate review of the district court's adverse judgment on the excess-acreage issue. Respondents reside in the Imperial Valley and desire to purchase the excess lands for farming, but they cannot afford the current market price of $1200 to $1400 per acre. If the excess-acreage limitation is applicable, however, excess lands will no longer receive project water unless, as provided in Section 46, the owners execute valid recordable contracts to sell such lands at prices that do not reflect the use of water from the Boulder Canyon Project. The value of these lands, appraised as dry lands, is a fraction of their value as irrigated or potentially irrigable lands, and has been estimated to be only $25 to $50 per acre. Moreover, as the court of appeals found (Pet. App. 18a, 20a), land in the Valley will not be available to respondents at below-market prices unless the excess-acreage limitation is applicable; on the other hand, application of the limitation will likely result in sales of excess acreage (Pet. App. 18a-19a, 67a). Thus, as in *Village of Arlington Heights* v. *Metropolitan Development Corp.*, 429 U.S. 252, 264 (1977), a judicial decree enforcing the excess-acreage provision would afford respondents the "opportunity" they seek to acquire such lands.

In these circumstances, it is clear that respondents have " 'alleged * * * a personal stake in the outcome of the controversy' " presented in this litigation and

have asserted "a distinct and palpable injury to * * * [themselves]" that is directly affected by the excess-acreage issue. *Warth* v. *Seldin*, 422 U.S. 490, 498, 501 (1975). Accordingly, they had standing under Article III to appeal from the district court's decision that the excess-acreage limitation is inapplicable to the Imperial Valley.

ARGUMENT

I. THE GENERAL EXCESS-ACREAGE LIMITATION OF SECTION 46 IS APPLICABLE TO PRIVATE LANDS IN THE IMPERIAL IRRIGATION DISTRICT THAT RECEIVE FEDERAL PROJECT WATER PURSUANT TO THE BOULDER CANYON PROJECT ACT

A. By Their Terms, Section 46 Of The Omnibus Adjustment Act And Section 14 Of The Boulder Canyon Project Act Provide That The Excess-Acreage Limitation Is Applicable To Private Lands In The Imperial Irrigation District

1. Since its enactment in 1902, the federal reclamation law has generally limited to 160 acres the amount of private land in single ownership that is eligible to receive water from a reclamation project.[8] "Acreage limitation is, in every respect, the most important

[8] Lands of more than 160 acres held by a single owner are commonly referred to as "excess lands." It should be noted that reclamation law has been administered to treat each adult owner separately, regardless of familial or other relationships. Moreover, as the court of appeals correctly noted (Pet. App. 6a n.2), a husband and wife in a community-property state, such as California, may receive project water for 320 acres under the reclamation law.

part of reclamation law." 2 R. Clark, *Waters and Water Rights* § 120, at 209 (1967). As the Court observed in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291, 292 (1958), the excess-acreage limitation "is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects" and has "been national policy for over half a century."

The purposes of the excess-acreage limitation are well established and were described by the Court in *Ivanhoe* as follows (357 U.S. at 292, 297):

> From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied.
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> The [reclamation] project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes. In short, the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed.

As succinctly summarized in *United States* v. *Tular Lake Canal Co.*, 535 F.2d 1093, 1094 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977), the excess-acreage limitation is designed "to open private land to settlement by farmers of modest means, to insure wide distribution of the benefits of the federal investment in the reclamation project, and to prevent private landowners from realizing a disproportionate windfall advantage from enhanced productivity and land values because of the project." [9]

The excess-acreage limitation, first enacted in Section 5 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 389, as amended, 43 U.S.C. 431 (Pet. App. 173a), has been consistently retained and strength-

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[9] See also 535 F.2d at 1099-1100 ("wide dispersion of the public subsidy, avoidance of speculation, and provision of family homes and farms"), 1103 ("spreading the federal subsidy, preventing speculation, and making it possible for people of limited means to establish farms on irrigated lands on which families could be self-sustaining"), 1119 ("secure the division and redistribution on a nonspeculative basis of large private land holdings receiving the subsidy of government-financed irrigation benefits"), *ibid.* ("create family-sized farms in areas irrigated by federal projects * * * [,] secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence of such projects[,] * * * [and] effect the breakup of large tracts of private lands on reclamation projects and assure the redistribution of such lands in small tracts at nonspeculative prices"), 1132 ("encourage family farms, distribute the reclamation subsidy widely, and avoid speculation").

ened in a series of successive statutes that culminated in Section 46 of the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 649, 43 U.S.C. 423e (Pet. App. 174a-175a). See generally *Tulare Lake, supra*, 535 F.2d at 1123-1136; Solicitor's Op. M-36919 (Dec. 6, 1979), at 19-38, —— Pub. Lands Dec. ——; A. 232a. Section 46 provides in pertinent part:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. * * * Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any said lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior * * *.

Section 46 was enacted in May 1926 and, by its terms, is applicable to "any new project," including, in particular, the Boulder Canyon Project that was authorized 19 months later. Accordingly, unless superseded by some other provision of law, the excess-acreage limitation of Section 46 governs the receipt of federal project water by private lands in the Imperial Irrigation District. And, as the Court noted in *Ivanhoe, supra*, "where a particular project has been exempted [from the general excess-acreage limitation] because of its peculiar circumstances, the Congress has always made such exemption by express enactment" (357 U.S. at 292).[10]

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[10] We are advised that, should petitioners prevail, the Imperial Irrigation District would be the only instance in which a federal reclamation project has been exempted from the excess-acreage limitation by implication rather than by explicit congressional directive.

The applicability of the excess-acreage limitation of Section 46 to the Imperial Irrigation District is confirmed by Section 14 of the Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1065, 43 U.S.C 617m (Pet. App. 166a), which reads:

> This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.[11]

On its face, Section 14 incorporates into the Boulder Canyon Project Act the general provisions of the reclamation law, including the excess-acreage limitation of Section 46, "except as otherwise * * * provided." [12]

Petitioners contend (79-421 Br. 40-42; 79-425 Br. 13) that the excess-acreage provision does not pertain to the "construction, operation, and management" of the project and therefore is not subsumed in Section 14. In their view, this phrase is confined "to the business and fiscal aspects of project management, and not to matters of social control, such as acreage limitation, governing water deliveries" (79-421 Br.

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[11] It is uncontroverted that Section 46 is part of the "reclamation law" as an act "amendatory [of] * * * and supplemental [to]" the 1902 Reclamation Act (Section 12 of the Boulder Canyon Project Act, ch. 42, 45 Stat. 1064, 43 U.S.C. 617k, Pet. App. 116a).

[12] See also Article 30 of the contract between the Secretary and the District (Pet. App. 203a).

40).[13] This argument is largely irrelevant, however, for even in the absence of this portion of Section 14, the excess-acreage limitation would apply to the District by virtue of Section 46 of the Omnibus Adjustment Act except as specifically provided to the contrary in the Boulder Canyon Project Act. In any event, as a matter of common usage, the phrase "operation and management" seems sufficiently broad to encompass the entire process involved in supplying project water, including the terms and conditions imposed upon the receipt of that water. This construction is also consistent with Section 8(b) of the Boulder Canyon Project Act, ch. 42, 45 Stat. 1062, 43 U.S.C. 617g(b) (Pet. App. 164a), which refers to "constructing, *managing, and operating* the dam, reservoir, canals, and other works herein authorized, *including the appropriation, delivery, and use of the water*" (emphasis added). Finally, and of greater importance, petitioners' argument ignores the fact that the very contracts required by Section 46, which

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[13] The consequence of this argument is that lands in the neighboring Coachella Valley, which are also governed by the Boulder Canyon Project Act, would likewise be exempt from the excess-acreage limitation of Section 46—a result that has never been suggested and is plainly untenable. See note 20, *infra*.

Moreover, as the Court noted in *California* v. *United States*, 438 U.S. 645, 651 n.6 (1978), "in the case of all * * * reclamation projects, Congress [has] specifically directed that * * * [they] be constructed and operated 'pursuant to Federal reclamation laws' * * *." Acceptance of petitioners' argument here would cast doubt on the applicability of the general excess-acreage limitation to all of those other projects.

include the excess-acreage limitation, expressly pertain to the "payment by the [irrigation] district or districts of the cost of constructing, *operating*, and maintaining the works" (emphasis added) and do not relate to the delivery of water.[14] Thus, Section 14 of the Boulder Canyon Project Act, in light of the ordinary meaning of its terms, the language employed in Section 8(b) of the Act, and the text of Section 46 of the Omnibus Adjustment Act, manifestly incorporates the general excess-acreage limitation of federal reclamation law.

2. Petitioners also contend that Section 46 is inconsistent with several provisions of the Boulder Canyon Project Act and that the excess-acreage limitation is therefore inapplicable because the Project Act has, in the words of Section 14, "otherwise * * * provided." However, nothing in the Act precludes the applicability of the excess-acreage restriction to private lands in the Imperial Valley.

a. Petitioners' principal assertion (79-421 Br. 29-33; 79-425 Br. 12, 13-14; 79-435 Br. 25-38) is that the lands in the Imperial Irrigation District were being cultivated through private irrigation before the passage of the Boulder Canyon Project Act and that application of the general excess-acreage limitation to those lands is therefore incompatible with

[14] We also note that Senator Johnson, the author of the Boulder Canyon Project Act, recognized that the Project Act incorporated provisions of the reclamation law, such as Section 8 of the 1902 Reclamation Act (Pet. App. 173a), that were unrelated to the business or fiscal aspects of the project. See 68 Cong. Rec. 4291-4292 (1927).

Section 6 of the Act, as construed in *Arizona* v. *California*, 373 U.S. 546 (1963), decree, 376 U.S. 340 (1964), supplemental decree, 439 U.S. 419 (1979), which provides that the Project "shall be used * * * second, for irrigation and domestic uses and satisfaction of present perfected rights * * *" (45 Stat. 1061, 43 U.S.C. 617e, Pet. App. 163a).[15]

However, the circumstance that these lands had previously been irrigated by private means does not distinguish the Boulder Canyon Project Act from most other federal reclamation programs. As the

[15] As defined in *Arizona* v. *California*, *supra*, 376 U.S. at 341, "perfected right"

> means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

and "present perfected rights"

> means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act * * *.

In 1929, 424,125 acres in the Imperial Irrigation District were being irrigated; approximately 438,000 acres were in irrigation in 1966, immediately prior to the commencement of this litigation (Pet. App. 81a, 83a; 439 U.S. at 429). Of course, petitioners' argument on present perfected rights is limited to the acreage that was receiving water in 1929 and does not extend either to the more recently irrigated acreage or to additional acreage that might be furnished water in the future.

court below stated (Pet. App. 48a, quoting *Tulare Lake, supra,* 535 F.2d at 1143):

> It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.[16]

Indeed, it appears that several projects undertaken before the Boulder Canyon Project involved lands that were already under private irrigation, a situation that has frequently recurred in subsequent projects:

> The reclamation program is not primarily one of bringing arid lands under irrigation for the first time. Congress was advised as early as 1924 that one of the first projects approved under the 1902 Act, if not the first, was the Salt River project in Arizona, in which nearly all of the land was privately owned and under irrigation through a system of private canals. The function of the federally financed reclamation reservoir was to furnish water storage needed to conserve and regulate the existing water supply. Six other similar projects were also called to Congress' attention. At this early date, Congress was warned, "It seems certain that the aid of the Government will be sought in the future to rescue meritorious but distressed private projects * * *." The forecast was accurate. The number of instances in which the federal project supplemented existing

[16] See also 535 F.2d at 1095 n.3, 1103, 1112-1113 & n.72, 1114 n.77, 1116, 1117, 1121 n.107.

> irrigation steadily increased. In 1961 it was estimated that 60 percent of the total reclamation acreage fell in this category.

Tulare Lake, supra, 535 F.2d at 1112 (footnote omitted). The same point is stressed in a leading treatise, 2 R. Clark, *Waters and Water Rights* § 120.2, at 215 (1967) (footnote omitted):

> Another [asserted] ground for departing [in a particular project] from the statutory acreage limitation is that the project is merely providing supplemental water to an already developed area. This fact in itself is hardly a justification, because reclamation today generally supplies only supplemental water.[17]

[17] In *Ivanhoe,* the Court "hasten[ed] to correct any impression that lands in the Central Valley had not been reclaimed and irrigated at the inception of the project" (357 U.S. at 283), although it noted that "irrigators in [the Ivanhoe District, one of several involved in the case] receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right" (357 U.S. at 285). See also *California* v. *United States,* 438 U.S. 645, 649 & n.3, 655 (1978):

> During the subsequent half century [following 1897], irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community. * * * [3]

[3] * * * Private development has continued to be a major contributor to the reclamation of the West. From 1902 to 1950, federal reclamation projects increased the amount of irrigated land by 5,700,000 acres. This still only accounted, however, for approximately one-fifth of the irrigated acreage in the 17 Western States covered by the Reclamation Act of 1902. During the same period from 1902 to 1950,

Thus, the fact of precedent private development does not warrant an exemption to the excess-acreage limitation for the Imperial Irrigation District.[18]

> private reclamation opened up over 10,000,000 acres for irrigation. * * *
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> As noted earlier, reclamation of the arid lands began almost immediately upon the arrival of pioneers to the Western States. Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption.

[18] We also note that the District has greatly benefited from the Boulder Canyon Project Act in ways unrelated to the number of acres under irrigation. In *Arizona* v. *California*, *supra*, 373 U.S. at 553, 579, the Court summarized the difficulties confronting the District before the Project:

> But none of the more or less primitive diversions made from the mainstream to the Colorado conserved enough water to meet the growing needs of the basin. The natural flow of the Colorado was too erratic, the river at many places in canyons too deep, and the engineering and economic hurdles too great for small farmers, larger groups, or even States to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem; spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farmland and crops.
>
> * * * * *
>
> The whole point of the [Boulder Canyon Project] Act was to replace the erratic, undependable, often destructive

Moreover, petitioners' argument rests on a misconception of Section 6 of the Project Act. Section 5 of

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> natural flow of the Colorado with the regular, dependable release of waters conserved and stored by the project.

See also *id.* at 554, 588. Thus, "the residents of the Imperial Valley * * * [received] the benefits of flood control, storage water, [and] the certainty of getting an equated flow * * *." 70 Cong. Rec. 576 (1928) (remarks of Senator King), quoted at A. 251a. In addition, the District is required to reimburse the government only for the construction costs of the "main canal and appurtenant structures" necessary to transport the water to the Valley, and has contributed nothing to the capital costs of the dam itself, the storage facilities, or the hydroelectric plant. Sections 1 and 4(b) of the Boulder Canyon Project Act (Pet. App. 155a, 158a-159a). As Senator King noted (70 Cong. Rec. 576 (1928)), "the residents of Imperial Valley * * * will be required to pay for nothing except the cost of the all-American canal." See also 70 Cong. Rec. 529 (1928) (remarks of Sen. Phipps); *id.* at 576 (remarks of Sen. Pittman). See generally *Ivanhoe*, *supra*, 357 U.S. at 299 ("irrigation interests are bearing but a small fraction of the cost of the water supply facilities"); *Tulare Lake*, *supra*, 535 F.2d at 1120 (footnote omitted):

> Users of project water for irrigation are not charged with project costs attributable to navigation, flood control, salinity prevention, production of hydroelectric power, storage of water for industrial and municipal uses, and other uses not directly related to irrigation. They may, however, receive substantial benefits from such nonreimbursable expenditures.

Finally, repayment of those construction costs charged to the District—approximately $25,000,000, compared to $175,000,000 for the dam and the power plant—did not commerce until 1955, is extended over 40 annual installments, and is made without interest (Pet. App. 85a; see also 36 Op. Att'y Gen. 121 (1929); 69 Cong. Rec. 7623 (1928) (remarks of Sen. Johnson and Sen. King); 70 Cong. Rec. 519 (1928) (remarks of Sen. King); *id.* at 521 (remarks of Sen. King and Sen. Phipps)). It is thus clear that "the repayment required is * * * only a small fraction of cost" (2 R. Clark, *Waters and Water*

the Act confers broad authority upon the Secretary of the Interior, "through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water." *Arizona* v. *California*, *supra*, 373 U.S. at 580. In our view, Section 6 was intended to "fetter the Secretary's discretion" (373 U.S. at 581) in determining those allocations. See also 373 U.S. at 582 & n.83. "[T]he Secretary, in making apportionments or contracts, * * * [must observe] the standards Congress has set for him to follow, including his obligation to respect 'present perfected rights' as of the date the Act was passed" (373 U.S. at 594).

This limitation in Section 6 on the discretion of the Secretary, however, does not unconditionally establish the antecedent eligibility to receive project water in the first instance or the terms and conditions upon which such water can be provided. Rather, it serves to set an " 'order of priority' " (373 U.S. at 583 n.84) for the delivery of water to which recipients are otherwise entitled. In this way, Section 6 precludes

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Rights § 118.3, at 187 (1967)); indeed, in the specific case of the Imperial Irrigation District, it has been estimated that landowners pay $5 per acre-foot of project water rather than the actual cost for that water of more than $25 per acre-foot (125 Cong. Rec. S12571 (daily ed. Sept. 14, 1979) (remarks of Sen. Nelson)). Hence, regardless of pre-Project development of the Valley, the Boulder Canyon Project Act inures to the substantial benefit of landowners in the District. In these circumstances, it is fully justified to impose on those landowners "the excess-acreage provision * * * as a ceiling * * * on the federal subsidy that is being bestowed." *Ivanhoe*, *supra*, 357 U.S. at 297.

the Secretary from adopting, among the range of conceivable approaches, an allocation system that would impair the "satisfaction of present perfected rights" of landowners who are eligible to receive a designated quantity of federal water; it does not override the underlying conditions of eligibility, which are prescribed by Congress. For this reason, Section 6 is simply immaterial to Congress' determination, in Section 46 of the Omnibus Adjustment Act and Section 14 of the Project Act, that excess lands shall not receive federal water.

In any event, even if Section 6 were pertinent here, application of the excess-acreage limitation would not conflict with Section 6 and the "satisfaction of present perfected rights." While present perfected rights must have been acquired in accordance with state law, the effect of such rights, like other issues under the reclamation acts, ultimately is a "matter[] of federal law." *Ivanhoe*, *supra*, 357 U.S. at 289. As the court of appeals held in this case, the present perfected rights at issue here reside in the Imperial Irrigation District rather than in the individual landowners (Pet. App. 33a-34a):

> It follows that all the present perfected rights owned by the Imperial Irrigation district as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be sup-

plied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District.

This conclusion is confirmed by the Court's recent supplemental decree in *Arizona* v. *California*, *supra*, which provided, with respect "to the present perfected rights to the use of mainstream water in each State" (439 U.S. at 420), that such rights accrued to "[t]he Imperial Irrigation District" (439 U.S. at 429).[19] Moreover, the court of appeals' analysis is consonant with the overall purposes of the Project Act, for it ensures that the excess lands, when conveyed in accordance with the reclamation law, will continue to receive water under Section 8 of the 1902 Reclamation Act (Pet. App. 173a) and Section 13(d) of the Project Act (43 U.S.C. 617*l*(d)); that purpose does not suggest, however, that current landowners should be relieved of the limitation on the size of a single holding that can receive federal water.

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[19] This supplemental decree resulted (439 U.S. at 420) from the Court's earlier direction that "the State[] of * * * California * * * shall furnish * * * a list of the present perfected rights, with their claimed priority dates, in the waters of the mainstream in * * * [California]" (376 U.S. at 351).

Accordingly, nothing in Section 6 of the Boulder Canyon Project Act militates against the conclusion that Section 46 of the Omnibus Adjustment Act, as incorporated in Section 14 of the Project Act, is applicable to private lands in the Imperial Irrigation District.

b. Petitioners next urge (79-421 Br. 34-36) that the Imperial Irrigation District is exempted from the excess-acreage limitation of general reclamation law by virtue of Section 1 of the Boulder Canyon Project Act, ch. 42, 45 Stat. 1057, 43 U.S.C. 617 (Pet. App. 155a-156a), which provides that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys." In their view, "[b]ecause contemporary thinking equated acreage limitation with the sale of a water right, the fact that Congress explicitly prohibited any charge for delivery of water to Imperial Valley was reflective of a belief that Imperial Valley, because of its vested pre-project water rights, was not an appropriate case in which to impose an acreage limitation" (79-421 Br. 34-35; footnote omitted).[20]

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[20] This argument, and the succeeding arguments discussed below (pages 41-46, *infra*), would have the effect of excluding the adjacent Coachella Valley as well as the Imperial Valley from the operation of the excess-acreage limitation; both are expressly included in the Boulder Canyon Project Act (Section 1, ch. 42, 45 Stat. 1057, 43 U.S.C. 617, Pet. App. 155a), and the statute affords no basis for distinguishing between them. Such a result, however, would be wholly unsupportable. In 1945, on the first occasion that the Department considered

In large measure, petitioners' argument in this regard is a reiteration of their previous contention that the excess-acreage limitation is incompatible with "the satisfaction of present perfected rights" under Section 6 of the Project Act. For the reasons set out above (pages 30-38, *supra*), petitioners' alternative formulation of that argument under Section 1 of the Act should also be rejected.[21]

Moreover, this provision in Section 1 of the Project Act was enacted to address different considerations than the applicability of the excess-acreage limitation. As explained in the Senate report (S. Rep. No. 592, 70th Cong., 1st Sess. 4 (1928)):

> The latter part of the amendment to the effect that no charge shall be made for irrigation water through the all-American canal is to avoid duplication of charge on the lands. These lands already have a water right, and since they are to reimburse the Government under the reclamation law the act should be perfectly clear that the lands are not to pay additional charges for water service.

The same explanation for this provision was offered by Senator King (70 Cong. Rec. 528 (1928)):

> I [have] reached the conclusion that perhaps it might not be just, in view of the fact that the Imperial Valley people would have to construct the canal, to impose upon them burdens for storage purposes and levy a charge upon them annually for water received from the reservoir. I reached that conclusion in part for the reason that the lands in the Imperial Valley which have been irrigated have, perhaps, a vested right, and it might be questionable whether we would have the power to impose a charge upon them for the use of water. At any rate, I gave them the benefit of all doubt, and I have offered this amendment, the effect of which, if adopted, will be that the Imperial Valley and the Coachella Valley will not be required to make payment for storage waters.

See also 69 Cong. Rec. 7626 (1928) (remarks of Sen. King and Sen. Phipps); 70 Cong. Rec. 529 (1928) (remarks of Sen. Hayden).

Thus, Section 1 was designed to avoid the possible unfairness of imposing a charge for water upon landowners who had a pre-existing right of use. There is no indication here of a congressional intent to exempt the Imperial Irrigation District from the excess-acreage limitation of reclamation law.

c. Petitioners further argue (79-421 Br. 36-37, 41-42; 79-425 Br. 12-13) that the inclusion of Section 9

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the question, the Interior Solicitor concluded that the excess-acreage limitation did apply to the Coachella Valley (A. 230a-253a); the contract between the Secretary and the Coachella Valley was, with the Valley's consent, amended accordingly, and the limitation has thereafter been consistently observed (A. 264a-265a). No one has ever suggested that the Coachella Valley is exempt from the excess-acreage provision, and any such suggestion would be baseless.

[21] We also suggest that petitioners' constricted reading of the word "sale" in Section 5 of the 1902 Reclamation Act, to be confined essentially to a commercial transaction for monetary consideration, is incorrect. See Solicitor's Op. M-36675, 71 Interior Dec. 498, 501-502 (1964) (A. 185a-186a).

in the Boulder Canyon Project Act (60 Stat. 36, 43 U.S.C. 617h, Pet. App. 165a-166a), shows that Congress meant to exempt private lands in the Imperial Irrigation District from the general excess-acreage limitation of federal reclamation law. According to petitioners, the fact that the Project Act in Section 9 explicitly imposed an excess-acreage limitation on public lands, but did not likewise impose a corresponding limitation on private lands, discloses such an intent. Petitioners similarly argue that Section 9 establishes the same excess-acreage standards for public lands as were already provided in Section 3 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 416, 432, 434 (Pet. App. 172a) and that Section 9 would therefore be superfluous if Congress believed it was incorporating the general reclamation law in Section 14 of the Project Act.

Petitioners' argument, however, founders on its faulty premise: there is no excess-acreage limitation applicable to public lands.[22] Neither Section 3 of the 1902 Reclamation Act nor Section 9 of the Project Act deals with excess-acreage limitations at all; rather, they govern public entry upon lands of the United States that are susceptible of irrigation and reclamation. As the court of appeals correctly concluded (Pet. App. 38a), "[t]he reference to a 160-

[22] Section 46 of the Omnibus Adjustment Act applies only to "irrigable lands held in private ownership" (Pet. App. 174a).

acre limit on tracts of public land [in Section 9, and, by the same token, in Section 3] merely limits the Secretary of the Interior's discretion in determining tract sizes."

Since Section 9 of the Project Act and Section 3 of the 1902 Act do not pertain to the excess-acreage limitation, it is of little moment for present purposes whether they substantially overlap. But, in any event, it is clear that the statutes do differ in substance. Principal among these differences is the extent to which public lands are withdrawn from entry. Section 3 *authorizes* the Secretary "to withdraw from entry, *except under the homestead laws*, any public lands believed to be susceptible of irrigation" by means of the given project (Pet. App. 172a; emphasis added); hence, under Section 3, public lands remain subject to entry pursuant to the homestead laws (and perhaps pursuant to other laws as well, in the discretion of the Secretary). Section 9, on the other hand, *requires* that "[a]ll lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the * * * [Boulder Canyon Project] *shall* be withdrawn from public entry [subject to subsequent reopening at the direction of the Secretary]" (Pet. App. 165a; emphasis added); thus, Section 9 mandates that lands be withdrawn altogether from public entry. As Senator Johnson explained the purpose underlying Section 9 of the Project Act (69 Cong. Rec. 7252 (1928); emphasis added):

Section 9 withdraws, very properly, the public lands susceptible of irrigation and reclamation under the works here provided for from entry. That is done for the very purpose of preventing what one newspaper at least, through its hired writers, has been accusing us of. It is done for the purpose of preventing *any* speculative scheme in real estate, so that there can be *no* individual, *no* syndicate, or others who will be able to gobble up land in the vicinity of this territory, land which is held by the United States—to gobble it up at a small fraction of its real worth, and then coin it by virtue of these works. *All the land belonging to the United States is withdrawn under this provision from entry,* and that is the answer to certain articles which have recently appeared in relation to the measure and the design of the bill.

Accordingly, the inclusion of Section 9 in the Boulder Canyon Project Act does not in any way suggest that Congress intended to eliminate the general excess-acreage limitation for the Imperial Irrigation District.

d. As their final statutory argument, petitioners contend (79-421 Br. 37-39) that Section 46 of the Omnibus Adjustment Act is in conflict with Section 4(b) of the Boulder Canyon Project Act, ch. 42, 45 Stat. 1059, 43 U.S.C. 617c(b) (Pet. App. 158a-159a) and therefore is excluded from Section 14 of the Project Act. Petitioners cite to three variances between Sections 46 and 4(b): *first,* that Section 46 calls for "a contract or contracts" governing repay-

ment of costs, while Section 4(b) speaks of "provision for revenues, by contract or otherwise"; *second,* that Section 46 specifies that the agreement for repayment be made "with an irrigation district or irrigation districts," while Section 4(b) is silent on the entity to enter into the repayment agreement on behalf of the landowners; and, *third,* that Section 46 provides that the contract for repayment be executed before "[any] water shall be delivered," while Section 4(b) states that an agreement must be reached "[b]efore any money is appropriated for * * * construction * * * or any construction work done or contracted for * * *."

None of these variances casts doubt on the applicability of the excess-acreage limitation to lands in the Imperial Irrigation District. Indeed, the first two points do not present conflicts between the statutes at all, for the requirements of Section 46 are completely consistent with the somewhat broader provisions of Section 4(b). In any event, these provisions of Section 4(b), to the extent they depart from Section 46, do not require that the Imperial Irrigation District be exempt from the separate requirement of the excess-acreage limitation. It is entirely feasible to comply both with the particular provisions of Section 4(b) regarding the nature, timing and party to the repayment agreement, and with the excess-acreage provision of Section 46. Thus, nothing in Section 4(b) suggests that the fundamental national policy em-

bodied in Section 46 be forsaken in the case of the Imperial Valley.[23]

B. The Legislative History Of The Boulder Canyon Project Act Does Not Demonstrate A Congressional Intent That The Excess-Acreage Limitation Be Inapplicable To Private Lands In The Imperial Irrigation District

Petitioners argue at some length (79-421 Br. 42-53; 79-435 Br. 38-46) that the legislative history of the Boulder Canyon Project Act reveals a congres-

[23] With particular reference to the requisite time to execute the reimbursement agreement, the legislative history of Section 4(b) fully explains the provisions of the Project Act. The Boulder Canyon Project was, as Senator Johnson stated, "the greatest constructive work now pending in the country, the greatest constructive work of our generation" (69 Cong. Rec. 7245 (1928)). In order that the burden of this $125,000,000 project (*id.* at 7248) not fall on the public treasury, the Act was designed to ensure that "[b]efore there can be a shovelful of earth turned or a single dollar expended the United States Government must have in its hands wholly executed contracts which will repay every penny contemplated to be expended under the bill" (*id.* at 7245). To this end, Section 4(b), "the most rigorous provision that ever was inserted in a measure of this character" (*id.* at 7250), was included in the legislation. See also 70 Cong. Rec. 520 (1928) (remarks of Sen. Jonhson); *id.* at 833 (remarks of Rep. Swing). Compare *Tulare Lake, supra*, 535 F.2d at 1133-1134 n.168, quoting S. Rep. No. 831, 69th Cong., 1st Sess. 3 (1926): "[The timing provisions of Section 46 have been amended because it] is thought that contracts could not be successfully negotiated until after some action involving an appropriation has been taken by the Federal Government * * *." In light of the extensive background of the Boulder Canyon Project Act, Congress apparently believed that the specified repayment agreements could be negotiated without this action on the part of the government that might be necessary in other situations.

sional intention to exempt lands in the Imperial Irrigation District from the excess-acreage limitation of federal reclamation law. As the court of appeals noted, however, "[i]n reviewing this history, it is important to remember that [petitioners] seek to find in it a specific exemption that cannot be found in the actual language of the Project Act" (Pet. App. 39a-40a). And, as the Court observed in *Ivanhoe, supra*, "where a particular project has been exempted [from the excess-acreage limitation] because of its peculiar circumstances, the Congress has always made such exemption by express enactment" (357 U.S. at 292). Petitioners' burden is thus a heavy one, for at a minimum they must show that the clear import of the statutory language to apply the excess-acreage limitation in the District is defeated by an explicit and unambiguous indication to the contrary in the history of the Act.

Petitioners fall far short of this showing. Given that Section 46, a provision of central importance to the reclamation law, had been passed less than two years before the Boulder Canyon Project Act, the exclusion of the Imperial Irrigation District from the excess-acreage limitation would most likely have been the subject of extensive deliberation and thorough analysis in Congress. However, petitioners have pointed to only a handful of occasions during the protracted six-year history of the Project Act on which the issue arose at all, and none of these involved the careful evaluation and vigorous debate

that could be expected to attend such a measure.[24] As the court of appeals concluded, "[t]he legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created" (Pet. App. 46a). This circumstance, by itself, makes it highly improbable that Congress intended the excess-acreage limitation not to apply to the Imperial Valley.

At all events, a detailed examination of the legislative history of the Boulder Canyon Project Act fails to demonstrate a congressional intent to exempt lands in the Imperial Irrigation District from the general excess-acreage limitation. The background and legislative efforts leading to the Project Act are set out in *Arizona* v. *California*, *supra*, 373 U.S. at 559-561, and need not be fully recounted here. In brief, the Act as passed was the fourth of the so-called Swing-Johnson bills introduced by Congressman Swing and Senator Johnson of California between 1922 and 1928. The third Swing-Johnson bill, submitted in 1926, contained the provision now found in Section 14 that the "Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise

[24] The principal controversies surrounding the Project Act were the allocation of water among the affected states (especially Arizona and California) and the construction of a hydroelectric plant.

herein provided." Senator Johnson explained that "[u]nder this [provision of the] bill * * * the entire project [is made] a part of the reclamation law * * * [T]his is a reclamation measure, made so by * * * [this provision] of the bill." 68 Cong. Rec. 4291 (1927). The Secretary of the Interior similarly interpreted this section of the bill to mean that "[i]n the sale of water to irrigation districts * * * the provisions of the reclamation act and of the Warren Act would apply." See H.R. Rep. No. 1657, 69th Cong., 2d Sess. 22 (1926).

In the House, the Committee on Irrigation and Reclamation added an express excess-acreage limitation to Section 1 of the third Swing-Johnson bill. See H.R. Rep. No. 1657, *supra*, at 29-30. This bill was reported by the Committee but never came to a vote on the floor. At the same time, the corresponding bill in the Senate (S. 3331) did not contain a comparable excess-acreage provision. As in the House, the third Swing-Johnson bill did not come up for a vote in the Senate.

In 1927, the fourth Swing-Johnson bill was introduced in Congress. As in the previous session, the House version contained the express excess-acreage limitation, but the Senate version did not. In this form the bill was passed by the House. 69 Cong. Rec. 9989-9990 (1928). The bill adopted by the House subsequently came to the floor of the Senate, where, on Senator Johnson's motion, it was unanimously amended by substituting the Senate version (S. 728). Senator Johnson explained that this substitution was

made "in order that the orderly legislative procedure may be preserved" and that the two bills had "like purposes and * * * like designs." 70 Cong. Rec. 67 (1928).[25] The Senate ultimately passed its version of the bill, without the explicit excess-acreage provision. 70 Cong. Rec. 603 (1928). Thereafter, the Senate version was considered in the House. Congressman Swing, in urging passage of the Senate bill, stated that "[t]he only differences [between the Senate and House bills], it seems to me, are matters relatively of small importance compared with the beginning of this great project." 70 Cong. Rec. 833 (1928). The House then accepted the Senate bill without any discussion of the omission of the express excess-acreage limitation that was contained in the bill it had previously adopted. The bill was signed into law by President Coolidge on December 21, 1928 (45 Stat. 1057).

In our view, this legislative history suggests that Section 14 of the Project Act, which was found in all of the above bills, was designed to incorporate the excess-acreage limitation of federal reclamation law. The House and Senate versions of the fourth Swing-Johnson bill plainly differed with respect to an express provision for application of the excess-acreage limitation. Yet, the Secretary of the Interior stated that the two bills were similar and failed to note any

[25] In a letter to the Senate Committee on Irrigation and Reclamation, the Secretary of the Interior had also stated that the Senate bill was similar to the House version. S. Rep. No. 592, 70th Cong., 1st Sess. 30, 31 (1928).

discrepancies with respect to the excess-acreage limitation; Senator Johnson observed that the House and Senate bills were of "like purposes" and "like designs," and the Senate unanimously agreed to Senator Johnson's proposal to substitute the Senate version for the House bill in the interest of "orderly legislative procedure"; and the House, after being advised by Congressman Swing that the differences between the bills were "matters relatively of small importance," accepted without objection the bill passed by the Senate that omitted the express provision regarding the excess-acreage limitation that the House had previously adopted. We submit that these principal features of the legislative history can be understood only if Congress recognized that the excess-acreage limitation was included in Section 14 of the Project Act. At the least, the legislative history does not contradict the conclusion, derived from the language of the statute and the fundamental purposes of the reclamation law, that the excess-acreage limitation is applicable to private lands in the Imperial Irrigation District that receive federal water under the Boulder Canyon Project Act.[26]

Petitioners rely on some half-dozen instances in which a Senate opponent of the Project Act either criticized the proposed bill for not expressly referring

[26] As the Court observed in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945), "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

to the excess-acreage limitation or attempted unsuccessfully to amend the bill to include an explicit provision to apply that limitation. However, these criticisms, several of which were made in the course of lengthy filibusters, elicited no response or discussion on the issue and, as statements of those opposing the measure, offer little if any guidance on the meaning of the Act. See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976), and cases cited therein. Likewise, none of the amendments proposed by these opponents was reported out of Committee or debated or voted upon in the Senate. And, as the court of appeals noted, all of these proposals were subject to serious objection on grounds wholly unrelated to the excess-acreage limitation (Pet. App. 43a, 46a n.59).[27] Congress' failure to act favorably on their proposed legislation, especially in view of the incorporation of the general reclamation law in Section 14 and the substantial objections to the rejected provisions for reasons other than any excess-acreage

[27] For example, petitioners rely (79-421 Br. 49; 79-435 Br. 44) on a bill, proposed in Committee by Senator Phipps, that included an express excess-acreage provision. However, the Secretary of the Interior objected to the Phipps bill on the ground that it did "not authorize the construction of a power plant and incidental structures suitable for the fullest economic development of electrical energy. The revenue to be derived from the sale of power is necessary to render the project feasible" (S. Rep. No. 592, *supra*, at 31). In fact, rather than basing his objection on the excess-acreage issue, the Secretary did not even advert to any difference between Senator Phipps' bill and Senator Johnson's bill on the question of the excess-acreage limitation.

issue, is surely "a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). See also, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969). In the circumstances of the case, "several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing * * * [bill] by some of its members, including the inference that the existing * * * [bill] already incorporated the offered change." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[28]

Thus, the legislative history cited by petitioners offers no basis to find that Congress intended the excess-acreage limitation to be inapplicable to private lands in the Imperial Irrigation District.

[28] As Solicitor General Rankin stated in the Memorandum In Behalf Of The United States With Respect To Relevance Of Non-Compliance With Acreage Limitations Of Reclamation Law at 2-3 n.5, *Arizona* v. *California*, No. 10, Original (O.T. 1957) (A. 261a-262a n.5):

> It is at best no more logical to argue, as the California defendants have, that the omission to include in the Project Act an express limitation with respect to lands in private ownership indicates a Congressional intent that no such limitation should apply than it is to argue that the express provision was deleted because it was thought section 14 was entirely adequate to accomplish the purpose.

C. The Administrative Practice Of The Department Of The Interior Does Not Render The Excess-Acreage Limitation Inapplicable To Private Lands In The Imperial Irrigation District

In support of their construction of the Boulder Canyon Project Act, petitioners emphasize (79-421 Br. 14-17; 79-425 Br. 7-16; 79-435 Br. 46-60, 66-68) that between 1933 and 1964 the Department of the Interior did not seek to apply the excess-acreage limitation to lands in the Imperial Irrigation District. However, an agency's construction of a statute is "only one input in the interpretational equation." *Zuber* v. *Allen*, *supra*, 396 U.S. at 192. The deference due the administrative interpretation of a statute "is constrained by * * * [the Court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 12, quoting *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). See also, *e.g.*, *SEC* v. *Sloan*, 436 U.S. 103, 117 (1978) ("[consistent and longstanding administrative interpretation cannot] overcome the clear contrary indications of the statute itself"); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974) ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"). For the reasons discussed above, the language and purpose of the statutes, uncontradicted by the legislative history of the Project Act, establish that the excess-acreage limitation is applicable to the Imperial Irrigation District and that the Department's position to the contrary

prior to 1964 was erroneous and unauthorized.[29]

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[29] Petitioners suggest (79-421 Br. 18-20, 24-27; 79-425 Br. 15-16; 79-435 Br. 57-60) that private landowners have relied to their detriment on the Department's prior position and therefore that the Secretary is now precluded from applying the excess-acreage limitation to the Imperial Valley. By the same token, however, these landowners for 40 years have benefited from the use of federal water that, as the court of appeals held, the Project Act prohibits. Moreover, it is well settled that administrative practices cannot "thwart the plain purpose of a valid law" (*United States* v. *San Francisco*, 310 U.S. 16, 32 (1940)) and that "[t]he doctrine of equitable estoppel is not a bar to the correction * * * of a mistake of law" (*Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957)). Notwithstanding any agreements or understandings that might have existed, "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). These principles apply with particular force in cases involving public property, which the government "holds * * * in trust for all the people." *United States* v. *California*, 332 U.S. 19, 40 (1947). See generally Brief for the United States at 44-50, *Andrus* v. *Shell Oil Co.*, No. 78-1815 (argued Jan. 15, 1980), copies of which are being sent to counsel for petitioners here. And, as will be discussed below (pages 57-64, *infra*), the Department's position after 1933 rested largely on a failure to act for reasons unrelated to the merits of the issue, rather than on either an independent re-examination of, or continued adherence to, the substantive conclusion previously reached. Especially in these circumstances, the Secretary is not foreclosed from abandoning the Department's prior construction to conform to the requirements of the statute. See, *e.g.*, *United States* v. *E.I. duPont deNemours & Co.*, 353 U.S. 586, 590 (1957); *Baltimore & O. R.R.* v. *Jackson*, 353 U.S. 325, 330-331 (1957).

We also note that Congress is currently considering legislation that would exempt the Imperial Valley from the excess-acreage limitation and would require any person who sub-

In any event, as the Court has recently observed:

> We consider that the rulings, interpretations and opinions of * * * [administrative agencies], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

General Electric Co. v. *Gilbert*, 429 U.S. 125, 141-142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See also, *e.g.*, *SEC* v. *Sloan*, *supra*, 436 U.S. at 118; *Morton* v. *Ruiz*, *supra*, 415 U.S. at 237. Despite petitioners' contention that the Department prior to 1964 consistently adhered to the view that the excess-acreage limitation did not apply to the Imperial Valley, the agency's position in this regard is, upon examination, wholly inadequate to warrant deference by the Court.

sequently acquires more than 160 acres of land in the Valley to pay interest on the portion of the District's outstanding indebtedness to the United States that is allocable to such land. The pending bill (S. 14, 96th Cong., 1st Sess., § 8 (1979)) has been passed by the Senate (125 Cong. Rec. S12465, S12574, S12576, S12594-S12596 (daily ed. Sept. 13 and 14, 1979)) and has been considered by the House in *Hearings on S.14 and Other Bills Concerning Acreage Limitations and the Reclamation Act of 1902 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 96th Cong., 2d Sess. (1979). In our view, Congress is the branch of government best suited to settle the excess-acreage question in a manner that fairly takes account of the wide range of competing interests, both public and private, at issue in this case. Indeed, one such accommodation is reflected in S. 14 itself, which, in imposing interest on newly acquired lands in excess of 160 acres, is similar to measures Congress has previously enacted in the reclamation area. See Small Reclamation Projects Act of 1956, 43 U.S.C. 422e.

Following passage of the Boulder Canyon Project Act in 1928, the Department and the Imperial Irrigation District undertook to negotiate the contract required by Sections 4(b) and 5 of the Act. Among the questions that arose during these negotiations was the applicability of the excess-acreage limitation to the Imperial Valley. In a 1930 memorandum—the only contemporaneous record that has been found in the Department's files (A. 196a n.25)—Mr. Northcutt Ely, then Executive Assistant to the Secretary of the Interior, stated that he saw "nothing to do but enforce it [the reclamation law's limitation of 160 acres to a particular owner] unless the Imperial Irrigation District can get new legislation" (A. 223a). Notwithstanding this conclusion, the contract as finally executed was silent on the excess-acreage issue.

The contract between the Department and the District was thereafter submitted to a California state court for confirmation, as required by law.[30] In connection with that confirmation proceeding, the District solicited from the Department a ruling on the applicability of the excess-acreage limitation, "pro-

[30] This confirmation proceeding will be further discussed below (see pages 68-72, *infra*).

vided, that such ruling would be that the 160-acre limitation did not apply. He [the attorney for the District] doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned" (A. 222a). In response to this request, Secretary Wilbur sent a letter to the District (A. 224a-226a) stating that it was not subject to Section 5 of the 1902 Reclamation Act, which provides in pertinent part that "[n]o right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner" (Pet. App. 173a). Secretary Wilbur based this conclusion on the grounds, *first*, that under Section 1 of the Project Act no charge was to be made for the delivery or use of water and hence no water was "sold" within the meaning of Section 5; *second*, that the issue had been raised during negotiation of the contract and had been resolved in favor of the District; *third*, that the Imperial Valley was under private irrigation prior to the Project Act and had a "vested right" to the use of that water; and, *fourth*, that in similar cases involving such "vested rights" the Department had previously allowed water to flow through government projects to excess lands.[31]

[31] A subsequent letter to the District from Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, stated that "in [Mr. Dent's] view the same principle discussed in the Secretary's letter" with respect to Section 5 is also pertinent to Section 46 of the Omnibus Adjustment Act (A. 227a-228a). Mr. Dent further noted that he had been "of the opinion that some specific provision

The delivery of water from the Boulder Canyon Project to the Imperial Valley began in 1940 (Pet. App. 4a). In 1944, a question arose concerning the applicability of the excess-acreage limitation to the adjacent Coachella Valley, which, like the Imperial Valley, receives water under the Boulder Canyon Project Act. The following year, Fowler Harper, the Solicitor of the Department of the Interior, concluded in a formal opinion that the general excess-acreage limitation of Section 46 did apply to the Coachella Valley (A. 230a-253a). This opinion, which was approved by Secretary Ickes (A. 253a), rejected the approach previously taken by Secretary Wilbur and severly criticized the 1933 letter to the District (A. 252a):

> Furthermore, an examination of the files reveals that the letter of the former Secretary was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provisions "provided, that such ruling would be that the 160-acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American

should be inserted regarding this acreage limitation and the original draft of the contract so provided," that the District had caused that provision to be omitted because "it would only be confusing and make the ratification [of the contract] by the landowners more difficult," and that he had "with reluctance agreed to elimination of the specific provision regarding acreage limitation" (A. 227a-228a).

> Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter (February 24, 1933), President Roosevelt was inaugurated.[32]

However, because the Wilbur letter was confined to the Imperial Valley and did not pertain to the Coachella Valley, it was not explicitly overturned.

In light of the Harper opinion, the Veterans of Foreign Wars requested in 1948 that Secretary Krug reconsider the Wilbur letter. Without addressing the merits of the issue, Secretary Krug declined to disturb the Department's position inasmuch as the landowners in the Imperial Valley "were entitled to rely upon the advice from the Secretary * * *. [Adherence to the Wilbur letter is] the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question" (A. 254a).[33]

In 1958, in connection with the *Arizona* v. *California* litigation in this Court, Solicitor General Rankin inquired of Interior Solicitor Bennett concerning the applicablity of the excess-acreage limitation to the Imperial Valley. Solicitor Bennett responded that he had "not had occasion to undertake a legal analysis

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[32] As Secretary Udall subsequently noted, "the rationale of * * * [Solicitor Harper's opinion] challenges the validity of Secretary Wilbur's view" (A. 265a).

[33] Much the same view was expressed by Solicitor General Griswold in declining to authorize an appeal by the United States in this case in 1971. See 117 Cong. Rec. 46228 (1971).

of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper," but that "[w]hatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so" (A. 255a).[34] Following this exchange of correspondence, Solicitor General Rankin submitted to the Special Master a Memorandum in Behalf of the United States that stated that the Harper opinion had "repudiated the conclusion reached in the Wilbur letter of 1933" (A. 261a). The government's memorandum then continued (A. 261a n.5):

> Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion, as well as for others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley * * *.

Solicitor General Rankin had a further opportunity in 1958 to present the views of the government on the applicability of the excess-acreage limitation to the Imperial Valley. In the Brief for the United States as Amicus Curiae in *Ivanhoe Irrigation District* v. *McCracken*, *supra*, the Solicitor General explained (page 37 n.9; emphasis added):

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[34] Solicitor Bennett also advised that the excess-acreage issue was not relevant to the question in *Arizona* v. *California* relating to the apportionment of water among the lower-basin states (A. 258a).

> Reclamation law contains many other references [in addition to Section 46 of the Omnibus Adjustment Act of May 25, 1926] to the acreage limitations, ranging in time from * * * [1911 to 1957], all of which evidence the consistency with which the Congress has adhered to acreage limitation as a basic policy in administration of the reclamation program. Although there are instances where particular projects have been exempted because of circumstances peculiar to those projects * * * such exemptions have always been accomplished by express enactment to that effect. *We disagree with the suggestion at page 48 of appellants' brief to the effect that acreage limitations are not applicable in the Imperial Irrigation District in California.*

In 1964, in response to a congressional inquiry (A. 263a-264a), Solicitor Barry of the Interior Department undertook a thorough review of the excess-acreage issue concerning the Imperial Valley. Based on this comprehensive effort, Solicitor Barry concluded in a formal opinion that the excess-acreage limitation was applicable to lands in the Imperial Irrigation District (A. 182a-210a). Solicitor Barry criticized the Wilbur letter on several grounds. He found that "the record is ambiguous as to whether the Department had actually determined the excess land laws not to be applicable to Imperial Irrigation District prior to the execution of the contract. There is no direct evidence of such a conclusion. To the contrary, the only record we have been able to find of consideration of the question prior to the execution of the contract indicates that the excess land limitations did

apply" (A. 196a n.25). He also found that Secretary Wilbur had misconstrued the pertinent statutes in determining that the excess-acreage limitation was inapplicable because the District had a vested water right and was not to be charged for water from the Boulder Canyon Project (A. 185a-186a, 198a-199a; see also A. 201a n.29). Solicitor Barry likewise found that Secretary Wilbur had erred in relying upon earlier Departmental decisions to allow water to be delivered through federal projects to land in excess of 160 acres; these had occurred only "in the special situation," unlike the Imperial Valley, "where existing physical facilities were being acquired by the Government for incorporation in a project" (A. 199a). In sum, after carefully considering the language and purpose of the relevant statutes, the legislative history of the Boulder Canyon Project Act, and the administrative practice with respect to the Imperial Valley, Solicitor Barry concluded that the excess-acreage limitation was applicable to the District and that "[t]he interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress" (A. 210a). Solicitor Barry's opinion was accepted by Secretary Udall and concurred in by the Attorney General (A. 347a), and has been consistently adhered to since that time by four Secretaries in three Administrations.

Thus, throughout the period 1933-1964, the only basis for the Department's position on the excess-acreage issue was Secretary Wilbur's letter in 1933.

Until Solicitor Barry's re-examination of the question in 1964, the Department either criticized the Wilbur letter without expressly overruling it, as in Solicitor Harper's 1945 opinion, or abided by the Wilbur letter for reasons other than its substantive validity, as in Secretary Krug's 1948 letter and Solicitor Bennett's 1958 memorandum. Moreover, the circumstances and contents of the Wilbur letter have from the outset suggested substantial doubt about its reliability. Finally, the correctness of the Wilbur letter has been soundly discredited by Solicitors Harper and Barry, and the Solicitor General on two occasions has argued on behalf of the United States that the excess-acreage limitation does apply to the Imperial Valley. In these circumstances, the administrative practice is simply inadequate to sustain petitioners' contention that the 1933 Wilbur letter offers controlling guidance on the excess-acreage issue.[35]

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[35] As the court of appeals summarized the legal effect of the Wilbur letter (Pet. App. 55a):

> In the case of the Wilbur letter, there is an informal opinion reached under circumstances indicating a lack of careful consideration. It does not purport to even consider the portion of the reclamation law in question in this case. The legal conclusions of the Wilbur letter have not been consistently held to be correct by the Department of the Interior. Most if not all of its reasoning was implicitly rejected in the Harper opinion of 1945 and it was explicitly rejected in the Barry opinion of 1964. The Wilbur letter does not construe ambiguous or doubtful language in the Project Act but in a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is

Petitioners also argue (79-435 Br. 51, 60-64; see also 79-421 Br. 15-16) that Congress has ratified the administrative practice not to apply the excess-acreage limitation to the Imperial Irrigation District. In support of their argument, petitioners point to congressional appropriations for the Boulder Canyon Project in the period 1936-1950 and to three amendments to the Act that Congress has adopted without expressing disapproval of the agency's position.[36]

> an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered. In these circumstances, insofar as the application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 is concerned, the Wilbur letter is not entitled to any deference as a proper construction of the Project Act and reclamation law.

[36] Petitioners also refer (79-421 Br. 14-16; 79-435 Br. 51-52, 61) to occasions on which, in the context of other reclamation projects, reference was made in congressional hearings to the Department's practice regarding the Imperial Valley. Particular emphasis is placed on the 1944 hearings concerning, in pertinent part, the Central Valley Project in California (79-421 Br. 14-15; 79-435 Br. 51-52), in which the Assistant Commissioner of Reclamation of the Department, relying solely on the 1933 Wilbur letter, stated to a Senate subcommittee that "[t]he [excess-acreage] limitation was never applied under the law to the Imperial Valley * * *" (A. 229a). See *Rivers and Harbors Omnibus Bill: Hearings on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess., Part V, 599, 764 (1944). This is hardly a considered assessment of the correctness of the Wilbur letter, and in any event was made to a subcommittee considering a bill that had nothing whatever to do with the applicability of the excess-acreage limitation to the Imperial Irrigation District. Moreover, because the subject of this testimony was a rider to

Given the uncertainties of the Department's practice in this area, only the clearest and most express statement by Congress could serve to exempt the Imperial Valley from the excess-acreage limitation. The instances cited by petitioners plainly do not constitute such a showing.

Indeed, the legislative record here fails to suggest in any way that Congress has considered and accepted the view that the excess-acreage limitation is inapplicable to the Imperial Irrigation District. None of the cited amendments to the Project Act involved the excess-acreage issue, and there is no indication that Congress directly considered, let alone resolved, the question. Especially in these circumstances, "[r]e-enactment * * * is an unreliable indicium at best." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). See, *e.g.*, *SEC* v. *Sloan*, *supra*, 436 U.S. at 120-121 ("when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court * * * [re-enactment] is scarcely the sort of congressional approval [that constitutes legislative ratification]"); *Zuber* v. *Allen*, *supra*, 396 U.S. at 185-186

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a river and harbors bill, the hearings were conducted by a subcommittee of the Senate Commerce Committee rather than of the Senate Interior Committee, which would usually have responsibility for reclamation bills. Finally, the particular provision at issue, which would have exempted the Central Valley Project from the excess-acreage limitation, was in fact deleted from the bill as finally enacted. See Act of March 2, 1945, ch. 19, 59 Stat. 10. See also Solicitor's Op. M-36919 (Dec. 6, 1979), at 42 n.151, —— Pub. Lands Dec. ——.

n.21 ("[w]here * * * there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence * * *").[37] Nor do the various appropriations for the Boulder Canyon Project, as part of the Department's annual budgets, amount to a congressional determination that the Imperial Valley is exempt from the general excess-acreage limitation. See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189-193 (1978).

Thus, Congress' possible awareness of the administrative practice provides no basis to conclude that the excess-acreage limitation is inapplicable to lands in the Imperial Irrigation District.

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[37] Moreover, "the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions" (*Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947)), and this "interpretative aid[]" could not lead to a contrary conclusion "if it were clear that the [Department's] action contradicted the requirements of the [Project Act]" (*Massachusetts Trustees* v. *United States*, 377 U.S. 235, 242 (1964)). "[T]hat rule [of congressional re-enactment] is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change." *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941). As previously discussed, Secretary Wilbur's letter of 1933 to the effect that the excess-acreage limitation does not apply to the Imperial Valley is inconsistent with the language and purpose of the Project Act and general reclamation law.

II. THE 1933 DECISION OF THE CALIFORNIA SUPERIOR COURT IN *HEWES* v. *ALL PERSONS* DOES NOT, AS A MATTER OF *RES JUDICATA* OR COMITY, PRECLUDE CONSIDERATION ON THE MERITS OF THE APPLICABILITY OF THE EXCESS-ACREAGE LIMITATION TO PRIVATE LANDS IN THE IMPERIAL IRRIGATION DISTRICT

Petitioners contend (79-421 Br. 56-64; 77-435 Br. 69-72) that, as a matter of *res judicata* and comity, the 1933 decision of the California superior court in *Hewes* v. *All Persons*, No. 15460 (Imperial County 1933), precluded the court of appeals, and precludes this Court, from considering on the merits whether the excess-acreage limitation is applicable to private lands in the Imperial Irrigation District.[38]

In 1932, the contract required by Sections 4(b) and 5 of the Boulder Canyon Project Act (Pet. App. 158a-159a) was agreed upon by the Secretary and the Imperial Irrigation District. In accordance with state law, the contract was then ratified at a general election. Thereafter, the District commenced an

[38] This defense of *res judicata* was not asserted against the United States as plaintiff in the district court (Pet. App. 24a). The United States has consistently taken the position that it is not bound by a judgment in a confirmation proceeding in which it did not appear as a party. See Memorandum In Behalf Of The United States With Respect To Relevance Of Non-Compliance With Acreage Limitations Of Reclamation Law at 2-3 n.5, *Arizona* v. *California*, No. 10, Original (O.T. 1957) (A. 262a); Brief For The United States As Amicus Curiae at 29-31, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); Solicitor's Op. M-36675, 71 Interior Dec. 498, 518 (1964) (A. 209a).

action in state court—*Hewes* v. *All Persons*, *supra*—to confirm the validity of the contract, as provided both in the contract (Article 31, Pet. App. 203a) and in state and federal law (Section 46 of the Omnibus Adjustment Act, 43 U.S.C. 423e, Pet. App. 174a; 43 U.S.C. 511, Pet. App. 169a-170a). This suit was an *in rem* action, to which the United States was not a party, and was confined by law to the issue of the validity of the written contract between the Secretary and the District.

At the same time, Charles Malan, an individual owning more than 160 acres of land in the Imperial Valley, brought an action to challenge the contract. Insofar as pertinent here, Malan objected to the contract on the ground that he would be denied delivery of water for his excess acreage. The United States was not a party to the *Malan* litigation.[39]

The California superior court disposed of the *Malan* case together with the confirmation proceeding in *Hewes*. The court found (Pet. App. 144a):

> That under said Contract * * * the delivery of water will not be limited to 160 acres in single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner

[39] It was in connection with *Malan* that the District sought the Department's view on the applicability of the excess-acreage limitation to the Imperial Valley, which resulted in the Wilbur letter of 1933 (see pages 57-58, *supra*).

affected by said contract, so far as the size of individual ownership is concerned.

The court also determined (Pet. App. 149a):

> That neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land held in a single ownership.

Concluding that there was no invalidity, the court confirmed the contract, which judgment became final upon the parties' dismissal of their appeals.[40]

The *res judicata* effect of this judgment does not bar the decision of the court of appeals that the excess-acreage limitation is applicable to lands in the Imperial Irrigation District. The sole issue in the *Hewes* confirmation proceeding was the validity of the contract.[41] On its face, the contract was silent with re-

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[40] We note that neither the District nor Malan wished the excess-acreage limitation to apply to the Imperial Valley. Because the *Hewes* judgment is not otherwise entitled to *res judicata* effect, however, this ground for challenging the judgment need not be considered (Pet. App. 27a n.31).

[41] "Nor is the confirmation proceeding designed to interpret the contract; it is a proceeding in rem and the only issue involved is the validity of the contract in so far as it rests on the action taken by the district." 2 R. Clark, *Waters and Water Rights* § 123.2(H), at 271 (1967) (footnote omitted). The California Supreme Court has recognized the narrow scope of a confirmation suit. See *Ivanhoe Irrigation District* v. *All Parties and Persons*, 47 Cal. 2d 597, 607, 306 P.2d 824, 829 (1957) ("The judgment [in a confirmation proceeding] is limited to a determination of the validiy of the contract"), rev'd on other grounds *sub nom. Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), on remand, 53 Cal.2d 692, 699, 3 Cal. Rptr. 317, 320, 350 P.2d 69, 72 (1960) ("the only issue involved [in a confirmation proceeding] is the validity of the contract").

spect to the applicability of an excess-acreage restriction. Thus, the court in *Hewes* correctly found that "*under said contract* * * * the delivery of water will not be limited to 160 acres in a single ownership * * * and that water service to lands regardless of the size of ownership will not be in any manner affected *by said contract*, so far as the size of individual ownership is concerned" (Pet. App. 144a; emphasis added); for this reason, the court properly concluded that "neither the United States nor Imperial Irrigation District is limited *by the terms of said contract* * * * in the delivery of water to any maximum acreage held in a single ownership" (Pet. App. 149a; emphasis added). However, the court exceeded the bounds of its limited jurisdiction in *Hewes* when it stated more broadly "that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership" (Pet. App. 144a) and "[t]hat neither the United States nor Imperial Irrigation District is limited * * * by any law applicable * * * [to the contract] in the delivery of water to any maximum acreage of land held in a single ownership" (Pet. App. 149a). To this extent, the court improperly departed from the issue before it in *Hewes* and impermissibly addressed more general questions of the applicability of the excess-acreage limitation, not under the contract, but rather directly under the statutes.

Nor was this latter aspect of the court's decision necessary to its holding on the validity of the contract. Any determination concerning the applicability of the excess-acreage limitation pursuant to the statutes would not have rendered the contract invalid under federal law, for the contract was silent on this point and thus not inconsistent with the requirements of the statute; the applicability *vel non* of the limitation did not bear on confirmation of the contract as a matter of federal law. By the same token, any decision regarding the statutory excess-acreage limitation would not have affected the validity of the contract under state law; whether or not the limitation applied by reason of the federal statutes, the written contract accepted by the District and approved in the general election could have been confirmed and taken effect. Hence, the court of appeals correctly concluded that resolution of this question in *Hewes* was immaterial to the only issue before the court—the validity of the contract—and therefore that the court's opinion in this regard is not entitled to *res judicata* effect.[42]

Moreover, even if the California superior court had been free to pass upon the general applicability of the excess-acreage limitation to the Imperial Valley, we submit that its 1933 decision in *Hewes* should

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[42] In contrast to the contract here, the contract in *Ivanhoe Irrigation District* v. *McCracken, supra,* explicitly "[i]ncorporat[ed] the requirements of * * * [the excess-acreage limitation of the statute and] provide[d] that project water shall not be furnished to lands in excess of 160 acres in single ownership" (357 U.S. at 285).

not foreclose re-examination of the excess-acreage issue in this case. Subsequent to 1933, there have been several legal developments pertinent to the proper resolution of this issue. Principal among these developments has been the Interior Department's continued consideration of the question, culminating in Solicitor Barry's formal opinion in 1964 that the excess-acreage limitation does apply to lands in the District; this Court's unanimous decision in 1957 in *Ivanhoe Irrigation District* v. *McCracken, supra,* which explicated, in the context of a confirmation proceeding, the excess-acreage limitation and its effect on water rights vested under state law; the Court's decision and decrees in *Arizona* v. *California, supra,* involving the Boulder Canyon Project Act and the concept of "present perfected rights"; and the decision in *California* v. *United States,* 438 U.S. 645 (1978), on which petitioners rely (79-421 Br. 58; 79-435 Br. 29 n.20, 38) to support their view of both the paramount importance of vested rights in this area and the principle of deference under the reclamation law to state policies and procedures. It cannot reasonably be doubted that, whatever the ultimate outcome, such developments bear centrally on the excess-acreage issue presented here.

In these circumstances, the question of the preclusive effect of *Hewes* is governed by the "general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Insurance*

Co. v. *Duel*, 324 U.S. 154, 162 (1945). As the Court explained in *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600 (1948), with regard to the related doctrine of collateral estoppel:

> That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time * * *.
>
> * * * * *
>
> [Collateral estoppel] must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. * * * [W]here the [legal] situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive.

See also *Montana* v. *United States*, 440 U.S. 147, 158-162 (1979); *Blair* v. *Commissioner*, 300 U.S. 5, 9 (1937).[43] Application of this principle is especially

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[43] It appears that California recognizes a similar rule. See *City of Los Angeles* v. *City of San Fernando*, 14 Cal.3d 199, 228, 123 Cal. Rptr. 1, 23, 537 P.2d 1250, 1272 (1975); *Pacific Tel. & Tel. Co.* v. *City & County of San Francisco*, 197 Cal. App.2d 133, 158, 17 Cal. Rptr. 687, 701-702 (1961), and cases cited therein. As the California Supreme Court explained in *City of Los Angeles* v. *City of San Fernando*, *supra*, 14 Cal.3d at 230, 123 Cal. Rptr. at 24, 537 P.2d at 1273:

> The res judicata effect of the prior determination between the parties of a question of *law* may differ from the effect of such prior determination of a question of *fact*. * * * [T]he public interest attached to the resolution of a question of law may require that it be determined without restriction from the collateral estoppel effect of prior litigation.

See also *Greenfield* v. *Mather*, 32 Cal.2d 23, 35, 194 P.2d 1, 8 (1948) ("[res judicata] will not be applied so rigidly as to defeat the ends of justice or important considerations of policy"). But cf. *Slater* v. *Blackwood*, 15 Cal.3d 791, 796, 126 Cal. Rptr. 225, 227, 543 P.2d 593, 595 (1975) (*Greenfield* doctrine not applied in private tort suit for damages, involving no issue of public importance, where change in law occurred following original judgment).

appropriate where, as here, the underlying substantive issue is of continuing public importance. Accordingly, the 1933 decision of the California superior court in *Hewes* does not foreclose consideration of the excess-acreage issue on the merits.

For the reasons discussed above with respect to *res judicata*, notions of comity and deference to state law also pose no bar to consideration of the substantive question in this case. The court of appeals gave due regard to the interests of the state embodied in the *Hewes* decision, but concluded that the state-court judgment was not dispositive. Contrary to petitioners' assertion, nothing in the court of appeals' analysis "violates the clear congressional purpose of deference 'to the substance[,] as well as the form[,] of state water law' " (79-421 Br. 58, quoting *California* v. *United States*, *supra*, 438 U.S. at 675). Indeed, as the Court repeatedly reaffirmed in *California* v. *United States*, specific directives in federal reclamation law, such as the excess-acreage limitation, were

intended to override inconsistent state law. See 438 U.S. at 664-665 n.19, 668-669 n.21, 670-673 & n.25, 678 n.31. See also *Ivanhoe Irrigation District* v. *McCracken, supra; City of Fresno* v. *California*, 372 U.S. 627 (1963); *Arizona* v. *California, supra.*

Thus, the 1933 decision of the California superior court in *Hewes* v. *All Persons* does not prevent resolution on the merits of the applicability of the excess-acreage limitation to lands in the Imperial Irrigation District.

III. RESPONDENTS YELLEN, *ET AL.*, WHO HAVE AN INTEREST IN PURCHASING EXCESS LANDS FOR FARMING AS PROVIDED IN THE FEDERAL RECLAMATION LAW, HAD STANDING UNDER ARTICLE III TO PROSECUTE AN APPEAL FROM THE ADVERSE JUDGMENT OF THE DISTRICT COURT

Petitioners contend (79-421 Br. 64-68; 79-435 Br. 75-85) that respondents Yellen, *et al.*, intervenors below and amici in the district court, lacked standing under Article III to appeal from the decision of the district court that the excess-acreage limitation is inapplicable to the Imperial Valley. In particular, petitioners assert that these respondents have failed to show a particularized injury that would be redressed by the requested judicial relief. The court of appeals correctly rejected this argument and held that the private respondents had standing under Article III to seek appellate review of the district court's adverse judgment on the excess-acreage issue (Pet. App. 16a-22a, 65a-70a).

In his affidavit in support of intervention, Dr. Yellen stated that he resides in the District; that he and the other private respondents do not own farm land in the United States; that they wish to acquire land in the District for farming; that, if the excess-acreage limitation were applied to the District, they would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior; and that farm land in the District has a market value of $1200 to $1400 per acre with federal project water and of $25 to $50 per acre without such water (A. 324a). Respondents Grimsley, Vasquez, Moreno, Armstrong, Pacheco, Salazar, Diaz, Ponce, Cortez, and Miranda also filed affidavits in which they stated that they reside in the District; that they are employed as agricultural workers; that they do not own farm land in the United States; and that they desire to purchase and to farm excess land (A. 326a-345a).

These affidavits adequately establish respondents' standing under Article III to pursue an appeal on the excess-acreage issue. Respondents wish to purchase, at a price they can afford, farm land in the District that is irrigated by federal project water. If the excess-acreage limitation is applicable to the District, excess lands will no longer receive project water unless "the owners thereof * * * execute valid recordable contracts for sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior" (Section 46 of the

Omnibus Adjustment Act, 43 U.S.C. 423e, Pet. App. 175a). Moreover, "the sale prices * * * [of excess land shall be] fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal *without reference to the * * * construction of the irrigation works*" (*ibid.*; emphasis added). Hence, in order for their excess lands to continue to receive project water, landowners would be required to agree to sell those lands at prices that reflect their "value as dry land rather than as irrigated or potentially irrigated land." 2 R. Clark, *Waters and Water Rights* § 120.1, at 213 (1967).[44] On the other hand, as the court of appeals found, "[i]n the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices. * * * [L]and will never be available at below current market prices unless Section 46 is held to be applicable" (Pet. App. 18a, 20a). Since their opportunity to purchase farm land in the District at affordable prices thus depends on the applicability of the excess-acreage limitation, respondents have " 'alleged * * * a personal stake in the outcome of the controversy' " presented in this litigation and have asserted "a distinct and palpable injury to * * * [themselves]" that is directly affected by the excess-acreage issue. *Warth* v. *Seldin*, 422 U.S. 490, 498, 501 (1975), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).[45]

[44] Petitioners contend (79-421 Br. 65-66 n.46; 79-435 Br. 81-82) that the court of appeals' decision upholding the private respondents' standing in this case is inconsistent with its decision that respondents did not have standing in a companion case involving the residency requirements of reclamation law (Pet. App. 7a-13a). While we do not concede that the court of appeals correctly determined the issue of standing in the residency case, and while the residency case is not before the Court and does not bear on the issue of standing in the instant case, we do note a substantial distinction between the two cases. If divestiture of land occurs as a result of the residency requirement, the Secretary has no authority to set the terms and conditions of the sale or to fix the price without reference to the federal project. Under the excess-acreage provision, on the other hand, the Secretary has precisely that authority. Thus, there is a far greater likelihood that respondents will be benefited by a judicial decree enforcing the excess-acreage limitation than one enforcing the residency requirement.

[45] Respondents' standing is not undermined, as petitioners suggest (79-421 Br. 66); 79-435 Br. 79), by the fact that their alleged injury "is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin, supra*, 422 U.S. at 501. See, *e.g.*, *United States* v. *SCRAP*, 412 U.S. 669, 686-688 (1973).

Petitioners also argue (79-435 Br. 83-85) that, because the District has now repaid one-half of the construction costs charged to it for the All-American Canal under the Boulder Canyon Project Act (Pet. App. 243a), the Secretary no longer has authority to set the sale price for excess lands, and therefore that respondents' standing has lapsed. This contention is incorrect. Section 46 of the Omnibus Adjustment Act provides (Pet. App. 175a), in the portion relied on by petitioners,

> that until one-half the construction charges against said [excess] lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior * * *.

On its face, this provision in Section 46 does not pertain to the required divestiture of excess lands, which is addressed

Respondents' standing in this case is demonstrated by the Court's recent decision in *Village of Arlington*

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in the preceding part of the statute, but rather to the distinct issue whether the conveyance of such lands without the approval of the Secretary includes the right to receive project water for those lands. The provision was designed to remedy the particular problem under the predecessor statute

> that control [by the Secretary] of the initial sale of excess lands did not prevent introduction of a middleman who could turn a rapid and substantial profit and resell to a settler at a burdensome price. * * * The problem of uncontrolled sales by middlemen was minimized by imposing controls [in Section 46] on at least some subsequent sales of excess lands * * *. * * * By imposing restrictions on subsequent sales of excess land only until one-half of the construction charges had been repaid, Congress reached an accommodation between competing policies of eliminating the middleman and allowing the purchasing settler to alienate his land freely and realize some of its enhanced value, which might be attributable in part to the settler's effort in reclaiming the land and preparing it for culmination.

United States v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1134 n.169, 1135 n.172 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). See also *id.* at 1135; 2 R. Clark, *Waters and Water Rights* § 120.1, at 212 (1967); Solicitor's Op. M-36919 (Dec. 6, 1979), at 31, 37, —— Pub. Lands Dec. ——. Moreover, as the court of appeals noted in its exhaustive opinion in *Tulare Lake* that rejected the contention raised by petitioners here, an interpretation of the statute that would allow landowners to circumvent the excess-acreage limitation by repaying one-half the project charges would "frustrate the purpose of Congress to secure the division and redistribution on a nonspeculative basis of large private landholdings receiving the subsidy of government-financed irrigation benefits" (535 F.2d at 1119) and would permit "the very persons against whom the requirements of Section 46 are directed * * * [to] avoid these requirements at their option * * *" (535 F.2d at 1120). "It is irrational to suppose that Congress would have given an option to the owners of such excess lands to prevent the accomplishment

Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the Village had denied an application to rezone certain property for multiple-family use in order to permit the

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of the purposes Congress sought to achieve—an option their self-interest would often compel them to exercise" (535 F.2d at 1121). Finally, petitioners' argument has been consistently rejected by the Department of the Interior. In 1961, Solicitor Barry, in a formal opinion concurred in by Attorney General Robert F. Kennedy (68 Interior Dec. 370 (1961)), concluded that "[p]ayout [of one half of the construction charges] is not relevant to the recordable contract requirement of Section 46 of the 1926 Act" (Solicitor's Op. M-36634, 68 Interior Dec. 374, 404-405 (1961)). This administrative position was relied on by the court in *Tulare Lake* (535 F.2d at 1095, 1142-1143) and was recently adhered to by the Solicitor of the Department (Solicitor's Op. M-36919 (Dec. 6, 1979), at 55-56, —— Pub. Lands Dec. ——). See also 125 Cong. Rec. S12473 (daily ed. Sept. 13, 1979) (letter of Secretary of the Interior Andrus advising that the Department has refused under existing law to adopt the payout theory advanced by petitioners here and opposing a pending bill (S. 14) that would provide such a payout option); Solicitor's Op. M-36913, 86 Pub. Lands Dec. 306 (1979) (Secretary has authority to approve the sale price (a) upon initial sales of excess lands and (b) upon resale of excess lands until one-half the allocated construction charges have been paid). For these reasons, petitioners' argument should be rejected as "a patent misconstruction of the meaning and purpose of the clause in question" (535 F.2d at 1134). However, if the Court finds that the standing of the private respondents ceased while their appeal was pending, the appropriate course would be to vacate the judgments of both the district court and the court of appeals rather than, as petitioners suggest (79-435 Br. 85), to leave the district court's judgment outstanding. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 & n.2 (1950); R. Stern & E. Gressman, *Supreme Court Practice* § 18.4 (5th ed. 1978).

construction of racially integrated housing for low- and moderate-income tenants. The developer and various individuals then brought suit to challenge the rezoning denial on the ground that it was racially discriminatory and violated, among other provisions, the Fourteenth Amendment and the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, 42 U.S.C. 3601 *et seq.* Ransom, one of the individual plaintiffs, had claimed standing based on his allegation that "he seeks and would qualify for the housing * * * [the developer] wants to build in Arlington Heights" and that "if * * * [the development] were built he would probably move there, since it is closer to his job" (429 U.S. at 264). The Court found these allegations sufficient to establish standing (*ibid.*):

> The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability," *Warth* v. *Seldin*, *supra*, at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights.[46]

As in *Arlington Heights*, application of the excess-acreage limitation here will afford respondents the

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[46] The Court has more recently formulated the test for standing to require "no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed * * *." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978) (citations omitted).

"opportunity" to purchase and to farm irrigable lands in the District.

Petitioners contend (79-421 Br. 67-68; 79-435 Br. 81-83) that there is not a sufficient probability in this case that excess lands would be sold, or that they would be sold to respondents, in the event that the excess-acreage limitation is held to be applicable to the District. In our view, however, it is most unlikely—indeed, it is inconceivable—that none of the excess lands would be sold if they were no longer eligible to receive project water. The Imperial Valley is undeniably devoted to agricultural use and completely dependent on the Boulder Canyon Project for water. As the court of appeals found (Pet. App. 18a-19a, 67a):

> While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural land-holdings would be available in small parcels at prices below the current market price.
>
> * * * * *
>
> While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses.

This determination plainly shows an adequate likelihood that the "opportunity" respondents seek will be realized.[47]

Likewise, while it cannot be ascertained with certainty that respondents will in fact acquire the excess lands that are sold, their prospects of doing so are adequate to satisfy the test for standing. Indeed, because lands that receive project water must be owned by "an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land" (Section 5 of the Reclamation Act of 1902, 43 U.S.C. 431, Pet. App. 173a), respondents as residents of the District have a greater probability than most other people to purchase the excess lands.[48] Moreover, as the Court said in *Arlington Heights* with respect to the developer that was held to have stand-

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[47] Moreover, there is no problem in this case, as there was in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), that all parties necessary for complete and effective relief are not before the Court.

[48] This residency requirement is established by Section 5 of the Reclamation Act of 1902, 43 U.S.C. 431 (Pet. App. 173a). Although the Department of the Interior has not enforced this provision for some time, the only court to have considered the issue has held that the residency requirement remains a valid and binding condition under federal reclamation law. See *Yellen* v. *Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972), vacated on grounds of standing, 559 F.2d 509 (9th Cir. 1977). The Solicitor of the Department has agreed with the district court's decision on the question in *Yellen* and has concluded in a formal opinion that the residency requirement continues to be a viable restriction on the receipt of project water. See Solicitor's Op. M-36919 (Dec. 6, 1979), —— Pub. Lands Dec. ——.

ing, the inapplicability of the excess-acreage limitation is, as a practical matter (429 U.S. at 261-262),

> an absolute barrier to * * * [purchasing the land]. If * * * [respondents] secure[] the * * * relief [they] seek[], that barrier will be removed. * * * [Such relief] would not, of course, guarantee that * * * [the acquisition would be accomplished]. * * * [Respondents] would still have to secure financing, qualify * * * [as buyers], and carry through with [the purchase]. But all * * * [land acquisitions] are subject to some extent to similar uncertainties. * * * [A] court is not required to engage in undue speculation as a predicate for finding that * * * [respondents have] the requisite personal stake in the controversy.[49]

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[49] Petitioners assert (79-421 Br. 66, 67; 79-435 Br. 79, 81) that respondents lack standing because they never attempted to procure land in the Valley and never stated the precise price at which they could afford to purchase excess lands under the reclamation law. However, respondents cannot be faulted for failing to engage in the obviously futile act of seeking to buy land at substantially less than current market prices. Similarly, since it cannot be known which tracts would eventually be sold as excess lands or when that sale would occur, respondents' failure to specify with exactitude the price they would be willing and able to pay does not detract from their standing; in any event, respondents' affidavits, fairly read, indicate that they would seek to purchase land at $25 to $50 per acre, which was their estimate of the appraised value of the land without reference to project water (A. 324a).

Moreover, petitioners' objections in this regard are highly technical and formalistic. Unlike *Warth* v. *Seldin*, *supra*, for example, where the absence of proper plaintiffs prevented the question of exclusionary zoning from being addressed

Accordingly, the private respondents had standing under Article III to appeal from the district court's adverse decision on the excess-acreage issue.[50]

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in a meaningful and concrete fashion, the alleged inadequacies in this case do not in any way affect the conduct of the litigation or impair the ability of a court to understand and resolve the issue presented. In addition, the asserted deficiencies could be easily corrected either on remand in this case or by plaintiffs in a new action. A dismissal of the case on standing grounds, therefore, would needlessly prolong the uncertainty regarding the applicability of the excess-acreage limitation to the Imperial Valley and would allow excess lands to continue to receive federal water to which, as the court of appeals held, they are not entitled.

[50] In addition to their standing as prospective purchasers of the excess lands, the private respondents might also have standing as residents of the District who seek to live in a community comprised of small, family farms as envisioned in the reclamation law. Cf. *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Because respondents' standing is clearly established by their interest in acquiring the excess lands, this alternative basis for their standing need not be pursued.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

No. 79-425

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

No. 79-435

IMPERIAL IRRIGATION DISTRICT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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First Annual Report of the Reclamation Service, H. Doc. No. 79, 57th Cong. 2d Sess. (1902) 24

Reclamation of Arid Lands, Committee on Arid Lands, H.R. Rep. No. 1468, 57th Cong. 1st Sess. (1902) 20

Fund For Reclamation of Arid Lands, H.R. Doc. No. 1262, 61st Cong. 3d Sess. (1911) 25

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Interior Solicitor Frank J. Barry, Sol.Op. M-36675, 71 I.D. 496 (1964) 48, 52, 58, 72, 104, 137, 139, 140, 142

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Restatement of Judgments (Second) § 68b, Tentative Draft No. 4 (1977)	161, 162, 163
Poli, Land Ownership and Operating Tenure in Imperial Valley, California, 12-13 (U.S. Department of Agriculture, Berkeley, Calif. 1942)	33, 34, 67
Sax, Federal Reclamation Law, 2 Waters and Water Rights, (1967)	4, 15, 66, 144
Sax, Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy, 64 Mich.L.Rev. 13 (1965)	23
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The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis, Staff Report by the Economics, Statistics, and Cooperative Service, U.S. Dept. of Agriculture, No. ECCS-04 (1978)	61, 64
Watkins, California: An Illustrated History (1973)	32, 33, 35

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,

Petitioners,

vs.

BEN YELLEN, et al.,

Respondents.

No. 79-425

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

BEN YELLEN, et al.,

Respondents.

No. 79-435

IMPERIAL IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

BEN YELLEN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Respondents are not satisfied with the shallow, misleading and often erroneous statement of the facts presented by petitioners. In view of these major shortcomings, it will unfortunately be necessary to go into great detail about the facts of this case in order to set the record straight.

The dispute before the Court involves a controversy between two groups of intervenors over the right to receive the federal water subsidy provided under the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617, et seq., to the Imperial Valley of California.

1. PROCEEDINGS BELOW.

The government filed a complaint against petitioner Imperial Irrigation District (hereinafter "the District") on January 11, 1967, seeking a declaratory judgment determining whether or not the 160 acre limitation of the reclamation law applied to privately owned lands in the Imperial Valley.[1] This action followed refusal of the Imperial Irrigation District to require its excess landowners to execute recordable contracts as required by reclamation law. Prior to trial, intervention as defendants was allowed for owners of excess lands and the State of California.[2] Respondents requested and were granted leave to file a brief amicus curiae in support of the government. 1 CR 66, 72; 2 CR 27. The trial court entered judgment on February 7, 1971 in favor of petitioners (1 CR 125, Con.App. 317a) after filing its opinion. 322 F.Supp. 11;

[1] 1 CR 1, Con.App.267a. The following form of abbreviations will be used in this brief: "CR" will be used to designate the Clerk's Record; "Tr.", the trial transcript; "Dist.App.", the District's Appendix; "Dist.Br.", the District's Brief; "L.Br.", the Landowners' Brief; "L.App.", the Landowners' Appendix; "Con.App.", the Consolidated Appendix; "LX-", the Landowners' Exhibits and "Pl.Ex.", the Government's Exhibits.

[2] The orders allowing intervention are not in the record on appeal. Proper entries appear on the Docket Sheet attached to Vol. 1 of the Clerk's Record. These entries appear at Con.App. 357a.

1 CR 87; L.App. 70a. Before expiration of the time to appeal, respondents moved for leave to intervene in order to appeal the judgment. 2 CR 47, Con.App. 319a. Their motion was denied. 1 CR 165, Con.App. 352a. Respondents filed a protective notice of appeal from the judgment (2 CR 45) and appealed from the order denying leave to intervene. 1 CR 204. The government did not appeal the judgment.[3]

On August 6, 1973 a panel of the court of appeals reversed the order denying intervention. 559 F.2d 543, L.App. 56a. The only reason provided for allowing intervention was to prevent a decisional conflict within the circuit. Respondents were parties to a case in the district court seeking compliance with the residency requirement of § 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. They had obtained a judgment mandating the Secretary to enforce the residency requirement in the Imperial Valley. *Yellen v. Hickel*, 335 F.Supp. 200 (S.D. Cal. 1971) (partial summary judgment), 352 F.Supp. 1300 (S.D. Cal. 1972) (final judgment).

Oral argument on the merits of both the acreage and residency cases was calendared to be heard at the same time. On August 18, 1977, another panel of the court of appeals vacated the judgment in the residency case because of lack of standing. It then reconsidered and thereafter reaffirmed its earlier order allowing intervention in the acreage case and reversed the judgment on the merits. Petitioners moved for rehearing and suggested rehearing in banc. Rules 48(a), 35(b), Fed.R.App.P. The panel requested and received an Answer from respondents and considered the rehearing petition for a 20-month period. On April 23, 1979, the panel filed a supplemental opinion denying the

[3] A more detailed discussion of respondents' intervention is found *infra* at p. 69.

petitions for rehearing. 595 F.2d 525. Judges Browning and Koelsch voted to reject the suggestions for the hearing in banc and Judge Wollenberg recommended rejection of the suggestions. The full court was advised of the suggestions for in banc rehearing and no judge of the court requested a vote on the suggestions. 595 F.2d at 528. Petitioners filed timely petitions for certiorari and the Court granted the petitions for certiorari on December 3, 1979.[4]

2. HISTORIC BACKGROUND OF THE RECLAMATION ACT.

The anti-monopoly provisions of reclamation law have been before this Court on only one previous occasion, *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958). *Ivanhoe* involved the application of the 160 acre limitation in the Central Valley of California. The statute involved was the Rivers and Harbors Act of August 26, 1937, 50 Stat. 844 and, as amended, the Rivers and Harbors Act of October 17, 1940, 54 Stat. 1198, commonly known as the Central Valley Project. The Court has never delved into the history of the Reclamation Act with an emphasis on the evolution of the anti-monopoly provisions, the 160 acre limitation and residency requirement. In the case at bench, the landowners treat that history only summarily and the District not at all. The contentions of petitioners pose a grave threat to the very underpinnings of the reclamation law and their claims must be viewed against the historic background of the law and national reclamation policy. To place the present controversy in proper context, respondents will set out the historical background of the Reclamation Act as summarized by Professor Sax, *Federal Reclamation Law,* 2 Waters and Water Rights, § 110, pp. 118, 113-122 (1967) (footnotes edited and renumbered):

[4]The Court granted petitions filed by the District, the Landowners and the State of California. All petitioners will be referred to jointly unless otherwise specified.

110—*Introduction*

Reclamation was the West's dramatic answer to Daniel Webster's rhetorical and unprophetic questions:

> What do we want with this vast worthless area—this region of savages and wild beasts, of deserts of shifting sands and whirlwinds of dust, of cactus and prairie dogs? To what use could we ever hope to put these great deserts and those endless mountain ranges, impenetrable and covered to their base with eternal snow?

Today the great physical structures of the reclamation program speak for themselves in refutation of those who doubted the potential of western development. The wisdom of the program as it has developed, however, has been a matter of continued controversy. To understand that controversy, one must know something of western history and the events surrounding the early disposition of the public domain. For any serious student of reclamation, this is a first and necessary task.

110.1—*Historical background*

Three circumstances brought about the passage of the first Reclamation Act: congressional determination to attack the evils of monopoly and corruption which had attended the disposition of the public domain; the drought decade which began in 1886 and demonstrated the inapplicability of humid-region land policies to the arid West; and recognition of the work of John Wesley Powell, who inspired and joined together the forces responsible for the Reclamation Act of 1902.

During the nineteenth century public attitudes about the West underwent a metamorphosis. The early view that the area west of the hundredth meridian was the Great American Desert, a desolate, worthless, and uninhabitable area, gave way to what historians have called the myth of the garden.[5] Supported by a cycle of unusually wet years, the pseudoscientific notion became current that settlement and cultivation tended to im-

[5]See Smith, *The Virgin Land.* ch. 16 (1950).

prove natural conditions—an idea which was summed up in the slogan "Rain Follows the Plough." This optimism fitted perfectly the political and social creed which saw settlement of a new frontier as a cure for the increasing ills of immigration, industrialization, and urbanization, such settlement to be achieved by the establishment of an independent yeomanry of small family farms. The best-known exponent of this vision was Horace Greeley, of whom the following statement is typical:[6]

> . . . if you strike off into the broad, free West, and make yourself a farm from Uncle Sam's generous domain, you will crowd nobody, starve nobody, and . . . neither you nor your children need evermore beg for Something to Do.

The Homestead Act of 1862,[7] with its promise of 160 acres of free land to those who would reside upon or cultivate it for five years, was designed to help men realize this dream. That the Homestead law largely failed in the West is well enough known,[8] but the basic reasons for its failure are worth recounting; they provided the historical basis upon which the architects of reclamation worked. First, the law failed to help potential homesteaders move across the country, to sustain themselves until they were self-sufficient, and to learn how to farm. Second, the law failed to prevent homesteads from falling into the hands of large owners and monopolists; it also neglected to revise other public domain laws which permitted the accumulation of large and desirable tracts by speculators. Finally, the provisions of the Homestead Act were totally inapplicable to arid-region conditions. A 160-acre tract was much too small for grazing—the only practicable use to which the land could be put without irrigation. Acquisition and improvement of land for irrigation were not possible without expenditures of capital which were infinitely beyond the means of the homesteader.

[6]Id., at p. 221.

[7]Act of May 20, 1862, ch. 75, 12 Stat. 392, 43 U.S.C. 161 et seq.

[8]See, e.g., Shannon, *The Farmer's Last Frontier*, ch. 3 (1945).

However misguided the Homestead Act was from the point of view of developing an independent western yeomanry, its provisions seem only mildly imprudent by comparison with other congressional schemes for disposing of the public domain. The Desert Land Act of 1877[9] permitted one, upon a small payment, to acquire up to 640 acres of arid land, provided he would irrigate it—a virtual impossibility; the Act was openly violated by the use of professional witnesses who would testify for a fee that they had "seen water upon the claim," meaning that a bucket had been emptied upon the ground in their presence. The law thus encouraged huge holdings by large sheep and cattle companies.

The Timber and Stone Act of 1878,[10] similarly implemented by the use of fraudulent claims filed by hired men, some at the small cost of a glass of beer, served to put millions of acres of invaluable timber land under the ownership of a handful of companies for a pittance. Meanwhile the choicest agricultural lands were acquired in great tracts by speculators and railroad companies and sold at large profits to settlers. While statesmen lauded the free-land policy, more land was actually sold to settlers by railroad companies than was conveyed under the Homestead Act, and the rate of tenancy on western farms rose steadily until 1900.

These land and water monopoly scandals set the stage for the development of a new political movement which led the struggle for a land policy that favored the family farm in fact as well as in theory. Such a movement was one of the essential preconditions to the development of federal reclamation policy, and it was the product of tragic experience in the early disposition of the public domain.

[9]Act of March 3, 1877, ch. 107, 19 Stat. 377, 43 U.S.C. 321 et seq.

[10]Act of June 3, 1878, ch. 151, 20 Stat. 89, 43 U.S.C. 311 to 313 (repealed by Act of August 1, 1955, ch. 448, 69 Stat. 434).

The second stimulus to reclamation policy was another tragedy: the drought decade which began in 1886. The blizzard winter of that year was a disaster for the great cattle companies, and its effects were political as well as economic. "The cattle interests which had gone a good way toward engrossing the Great Plains were not precisely stopped in their tracks, but they were slowed down, their power and their will to fight for their privileges temporarily weakened."[11] The drought not only weakened the opposition, but simultaneously gave the radical agrarian movement its most potent weapon—a vivid demonstration of the inadequacy of a land policy which merely offered the land, with nothing further in the way of Government aid.

Finally, there was John Wesley Powell, of whom Bernard DeVoto said, "He was a great man and a prophet."[12] Powell was a pioneer explorer of the Colorado River basin, a Union Army veteran who lost his right arm at Shiloh, a teacher, a geologist and ethnographer of note, a skillful political strategist and lobbyist, and—most significantly—a political philosopher who proposed a whole new system of government for the arid region, based upon the needs generated by the nature of the area rather than upon the standard preconceptions of distant legislators. Explosively revolutionary in the later nineteenth century, many of his major ideas have been or are being realized in some form today. River-basin planning is his concept; the water conservancy district as a unit of self-government is significantly his concept; land classification was one of his major themes.

The antimonopoly provisions which have figured so centrally in reclamation law were a direct outgrowth of Powell's proposals. He saw that "when the area to which it is possible to take the water of any given stream is much greater than the stream is competent to serve, if the land titles and water rights are sev-

[11]Stegner, *Beyond the Hundredth Meridian*, p. 295 (1954).
[12]Stegner, *Beyond the Hundredth Meridian*, p. xvi (1954).

ered, the owner of any tract of land is at the mercy of the owner of the water right. . . . If the water rights fall into the hands of irrigating companies and the lands into the hands of individual farmers, the farmers then will be dependent upon the stock companies, and eventually the monopoly of water rights will be an intolerable burden to the people."[13] To prevent this Powell proposed that "the right to use water should inhere in the land to be irrigated, and water rights should go with land titles."[14] He also suggested that if, after an opportunity of five years to irrigate his land, any owner should not do so, the right to the use of the necessary water to reclaim the lands should lapse.[15] Since, as Powell recognized, a new farmer needed to secure an inchoate right in water while he was preparing his land for utilization,[16] this latter provision was necessary to prevent the sale of "paper" water rights with lands that never actually were brought into cultivation.

Although Powell is quite uniformly recognized as the father of the reclamation program, his proposals never included the principal element of reclamation as it actually developed—the building and financing of irrigation works by the federal government. After proposing the classification of irrigable lands and the closing of the land to all but homestead entries, he suggested that any nine or more persons be entitled to join together to form an irrigation district which would be a model of cooperative self-government, distributing the waters and dividing the parcels in the shape most convenient for irrigation, so long as no one person got more than eighty acres.[17] Powell envisioned no overt role for Government in the development of irrigation; his view, quite wrong as we now

[13]Powell, *Report on the Lands of the Arid Region*, p. 40 (Govt. Print. Office 1879).
[14]Id., at p. 41.
[15]Id., at p. 32.
[16]Id., at p. 43.
[17]Powell, *Report on the Lands of the Arid Region*, pp. 30-32 (Govt. Print. Office, 1879).

know, was that "the increment of value given to lands by reason of their being irrigated is sufficient to pay the cost of constructing the irrigation works many times over. So there is no need of any Government aid. . . ."[18]

This conclusion does not suggest, however, that Powell fell victim to the typical naive myths about individual enterprise. Quite to the contrary, he was pre-eminently the advocate of comprehensive, large-scale planning for the arid West. He proposed integrated management of vast areas of timber, pasturage, and agricultural land; he proposed the investment of millions in large dams to control the major streams; he proposed the building of huge, joint reservoirs in the mountains, many miles from the land to be irrigated. He even talked quite openly about western water control as a "national" issue which was of great interest and benefit even to those on the lower Mississippi.[19]

To Powell such schemes—which to us seem impossible of achievement except by the national government—were a part of his vision of a whole new political structure for America, in which public entities created within hydrographic boundaries and embracing several states would, as "a great body of commonwealths" engage in vast new experiments in self-government.[20] Whether Powell actually believed his dream could come to pass or whether, as his biographer indicates,[21] he was merely concealing—for political purposes—his view that large-scale federal intervention was inevitable, is uncertain. In any event, with the rejection of his plan to reorganize the West along water-basin lines, there remained no institution

[18]11 U.S. Geol. Survey Ann. Rep., pt.2, p. 252 (1889-1890). See also Webb, *The Great Plains*, pp. 355-356 (1931).

[19]10 U.S. Geol. Survey Ann. Rep., pt. 2, p. 7 (1889-1890).

[20]This view is concisely delineated in 11 U.S. Geol. Survey Ann. Rep., pt. 2, at pp. 255-257 (1889-1890).

[21]See Stegner, *Beyond the Hundreth Meridian*, pp. 307-310 (1954).

capable of carrying out his plans except the national government.[22]

Whatever his reason, Powell judged correctly the mood of the Country at the time. In a sharply split report issued by the Senate Committee on Irrigation and Reclamation in 1890,[23] in which Major Powell's general views were the center of controversy,[24] both majority and minority agreed that reclamation was a matter for private enterprise:

> The question for consideration is: What action should be taken by the Government to enable the people to reclaim these desert lands? The reclamation must be initiated and executed by the people, and not by their Government. . . . If the opportunity is furnished to the people of this country they will reclaim these desert lands so far as reclamation is necessary. The use of industrial cooperation in developing the mineral resources of the far West demonstrates the capacity of the people for great undertakings which in other countries require vast expenditures of accumulated capital.[25]

As late as 1896 none of the leaders of the reclamation movement had yet advocated a federal construction program. The campaign for a reclamation program financed and built by the federal government cannot really be said to have begun until the last decade of the nineteenth century. Although suggestions of some federal aid to reclamation had been made officially as early as 1874, and though federal financing was mentioned in Congress by 1888, serious consideration of a federal building program began no earlier than 1894. At that time several factors combined to bring the

[22]The manifest failure of the Carey Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U.S.C. 641, indicated the inability of the states and private companies to do the job. See Shannon, *The Farmer's Last Frontier*, p. 216 (1945).

[23]S.Rep. No. 928, 51st Congress, 1st Sess. (1890).

[24]Powell's congressional travails are discussed in Stegner, *Beyond the Hundredth Meridian*, pp. 328-350 (1954).

[25]S.Rep. No. 928, 51st Congress, 1st Sess., pp. 7-8 (1890). The minority report, concurring in this view, is reported at pp. 142-143.

matter to congressional attention. The most important of these were the rise of the National Irrigation Congress as an articulate and influential pressure group; the depression beginning in 1894, with its accompanying financial failures among supposedly stable private irrigation companies; and a number of disastrous dam failures.

The first legislative reaction to these events was the abortive Carey Act[26] which sought to put the burden upon state and private initiative. The debates over that law, for which even its sponsor had small expectations, contained the first serious congressional consideration of the proposition that only the federal government was in a position to carry forward the work of reclamation. Such ideas were now acceptable because of the spadework done by enthusiasts like William E. Smythe of the National Irrigation Congress.

The Carey Act, as expected, resulted in very little reclamation. It was a demonstration of what was, by then, reasonably obvious—that large-scale reclamation works were not a profitable enterprise. This experience, rather than leading to abandonment of the movement or to promotion of reclamation as a non-reimbursable governmental expenditure, produced instead a third position, designed to refashion the reclamation program into a form acceptable to the prevailing political necessities. This new position required a showing that reclamation was a proper national concern, a test presumably met by the assertion that it was "as right for the national government to make the streams and rivers of the arid region useful . . . as to make useful the rivers and harbors of the humid region" by flood control.[27] Right or wrong,

[26]Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U.S.C. 641.

[27]35 Cong. Rec. 86 (1901) (President Roosevelt's message to Congress). The analogy to the rivers and harbor program had been suggested by an army engineer, Col. Hiram M. Chittenden, in Preliminary Examination of Reservoir Sites in Wyoming and Colorado, H.R. Doc. No. 141, 55th Congress, 2d Sess. (1897).

without regard to the many differences, at this point saying it made it so.

The proposal was then sweetened by the assertion that reclamation could be financially painless; the costs of reclamation would be paid by the proceeds of public-land sales, replenished through repayment of construction costs by the water users themselves. By 1900 the Republican party included in its national platform support of "adequate national legislation to reclaim the arid lands."[28] With the accession of Theodore Roosevelt to the presidency, the reclamation movement had at last the needed key to success. In his inaugural address Roosevelt enthusiastically endorsed a program of federal dam and reservoir building. Shortly thereafter Francis G. Newlands of Nevada introduced a bill in Congress; opposition was sharp and substantial, but Newlands had the votes and on June 17, 1902 the federal reclamation program was born.

110.2—*The reclamation program in brief*

The basic principle of the 1902 Reclamation Act was that the United States would build irrigation works from the proceeds of public-land sales in the sixteen arid western states. Texas was added as a reclamation state in 1906. Water thus provided would be made available to both public and private lands. In order to receive water, the irrigator had to agree to repay current maintenance costs each year, and to return the cost of construction in full within ten years, but without any interest. It was hoped that thereby a revolving fund would be created which would make reclamation economically self-sufficient.

In order to prevent monopolization, a number of safeguards were enacted. The law provided that water could not be sold for use on more than 160 acres in any individual private ownership, that the user had to be a resident or occupant upon the land, and that water rights were to be appurtenant to the land.[29]

[28]35 Cong. Rec. 6676 (1902).

[29]§ 5, 32 Stat. 389, 43 U.S.C. § 431.

During the succeeding years much of the Act has undergone great change. From a program limited to irrigation, reclamation has become one in which water may be provided for power, municipal, commercial, and industrial uses, although in general it still retains a preference for irrigation uses. Since 1911 the Secretary of the Interior has been authorized to make storage space available, and to sell surplus waters for use away from the project. In recent years increasing provision has been made for assuring recreation and fish and wildlife benefits in projects. Also, under the current multiple-use concept, such features as flood control and navigation may be included in reclamation projects; these elements, viewed as national benefits, are non-reimbursable and thus lighten the financial load for the immediate beneficiaries.

The original law gave the Secretary full authority to initiate projects as long as there was money in the reclamation fund. Today the law requires a rather complex feasibility study, designed to assure that projects are not only sound in engineering matters, but also worthwhile as investments for the United States (meaning that economic benefits will exceed the costs) and that the United States is reasonably assured of being repaid. While congressional authorization is not formally required, in practice each major project is individually authorized by Congress, often after lengthy hearings.

Despite the original plan, the reclamation program has never been self-supporting. Substantial construction moneys are appropriated from the general treasury; the ten-year interest-free time for repayment by irrigation users has in practice been extended to fifty years; and irrigation users—who pay only what they are deemed are able to afford—are subsidized in large part by power and municipal users. The Secretary is authorized to enter into water-service contracts as to some facilities without even observing the forty-year repayment time; and under such contracts water may be supplied in return for payment of little more than current operating expenses.

The original program, wherein the Secretary of the Interior dealt with each water user, has been supplanted by the requirement of a water users' association contract with the Secretary, undertaking the repayment obligation, backed by its power to tax lands within the project. Generally it is these associations which operate the distribution systems and deal with individual water users.

The simple prohibition upon selling the use of water to privately owned lands exceeding 160 acres has been subject to a good deal of elaboration, little of which has been effective. The basic changes in the law were designed to facilitate the breakup of large holdings. No landowner is required as such to sell his excess lands. But if he does not agree to sell them, he cannot receive project water for them. If he wishes to have project water for the excess lands, he must agree to sell them within a period set by contract, generally ten years. Even if the excess-land owner does not apply for project water for his excess land, if, before repayment is half completed, he sells those lands at a price exceeding that satisfactory to the Secretary (its value without enhancement by reason of the presence of the project, usually meaning its dry-land value), the purchaser cannot receive project water for the land.

Professor Sax summarizes the purpose and history of the excess land law (Sax, *supra,* section 120.1, pp. 210-214, footnotes edited and renumbered):

> Representative Francis G. Newlands, sponsor of the original Reclamation Act, made the most concise statement of the excess-land law's purpose:[30]
>
> > We have not felt in this country the evils of land monopoly. Lord Macaulay said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test of the future, and the very purpose

[30] 35 Cong. Rec. 6734 (1902).

> of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country, to give to each man only the amount of land that will be necessary for the support of a family . . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution, which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of the Filipinos against Spanish authority.

To safeguard against monopoly, the 1902 act provided: "No right to the use of water for land in a private ownership shall be sold for a tract exceeding 160 acres to any one landowner."[31] While other antimonopoly and antispeculation provisions have been enacted, and will be mentioned, it is the acreage-limitation law which has been the center of attention and which will be discussed here.[32]

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[31]Act of June 17, 1902, ch. 1093, § 5, 32 Stat. 389, 43 U.S.C. 431. The later excess-land provisions are found in Act of August 9, 1912, ch. 278, § 3, 37 Stat. 266, as amended, 43 U.S.C. 544; Act of August 13, 1914, ch. 247, § 12, 38 Stat. 689, 43 U.S.C. 418; Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, as amended, 43 U.S.C. 423e.

[32]Also significant were the appurtenance provision, tying the water to the land and preventing speculation in water rights as such, Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 390, 43 U.S.C. 372, and the residency requirement, Act of June 17, 1902, ch. 1093, § 5, 32 Stat. 389, 43 U.S.C. 431 (discussed at section 121 infra) designed to protect against absentee ownership. Other laws, such as the cultivation requirement, Act of August 13, 1914, ch. 247, § 8, 38 Stat. 688, 43 U.S.C. 440, designed to prevent land being held out of production for speculative purposes, came later.

A variety of the other antispeculation provisions apply only to publicly owned lands. See Dept. of the Interior, *Acreage Limitation Policy*, pp. 3-4, 8-9, Study Prepared for the Senate Committee on Interior and Insular Affairs, 88th Congress, 2d Sess., (Committee Print, 1964) (hereafter cited as *Acreage Limitation Policy*).

Good general discussions of the problems of landownership in reclamation law are contained in two Government publications. *Acreage Limitation Policy*, and Dept. of the Interior, Bureau of Reclamation, *Landownership Survey on Federal Reclamation Projects* (Govt. Print. Office, 1946) (hereinafter cited as *Landownership Survey*).

The early years of reclamation demonstrated that merely restricting water sales was not sufficient to prevent speculation and monopoly. The purposes of the law were being frustrated by two practices which were not regulated by the 1902 statute. First, owners of large acreages were holding much of their excess lands out of production, speculating that they would rise in value as land became more scarce. This practice delayed the use of project lands for production which would begin to help repay construction costs. Second, when owners sold their land, they often reaped huge profits, since the market value of the land included the value of the prospect of project water. Thus large owners in effect capitalized the federal subsidy for their own benefit, to the detriment of their purchasers,

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The literature on the excess-land law is quite extensive. See Graham, *Some Aspects of Federal-State Relationships in California Water Resources Development*, p. 146 (1961); Taylor, Excess Land Law: Calculated Circumvention, 52 Calif. L. Rev. 978 (1964); Taylor, Excess Land Law: Secretary's Decision? A Study in Administration of Federal-State Relations, 9 U.C.L.A. L. Rev. 1 (1962); Taylor, The Excess Land Law: Pressure vs. Principle, 47 Calif. L. Rev. 499 (1959); Taylor, The Excess Land Law: Legislative Erosion of Public Policy, 30 Rocky Mt. L. Rev. 480 (1958); Taylor, Excess Land Law on the Kern?, Calif. L. Rev. 153 (1958); Taylor, Destruction of Federal Reclamation Policy? The Ivanhoe Case, 10 Stan. L. Rev. 76 (1957); Trelease, Government Ownership and Trusteeship of Water, 45 Calif. L. Rev. 638 (1957); Comment, The Ivanhoe Decision: The Validity of Contracts Containing the 160 Acre Limitation, 45 Calif. L. Rev. 763 (1957); Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L. J. 477 (1955); Taylor, The 160-Acre Water Limitation and the Water Resources Commission, 3 West. Pol. Q. 435 (1950); Graham, The Central Valley Project: Resource Development of a Natural Basin, 38 Calif. L. Rev. 588 (1950); Maass, Administering the CVP, 38 Calif. L. Rev. 666 (1950); Note Acreage Limitation: Policy Considerations, 38 Calif. L. Rev. 728 (1950); Fuller, Acreage Limitation in Federal Irrigation Projects With Particular Reference to the Central Valley Project of California, 31 J. Farm Econ. 976 (1949); Taylor, Central Valley Project: Water and Land, 2 West. Pol. Q. 229 (1949); de Roos, *The Thirsty Land* (1948); Downey, *They Would Rule the Valley* (1947).

who were the bona fide settlers on the land and the intended recipients of the subsidy.

Laws were passed in 1912[33] and 1914[34] in an attempt to remedy these problems. The 1914 act authorized the Secretary to require that certain portions of the land be cultivated within three or five years,[35] under penalty of having the water right canceled, and to impose an annual 5% increase in construction charges for land held out of cultivation.[36] The act also provided that before construction began, owners must agree to dispose of excess lands upon such terms and at such price as the Secretary should designate; the penalty for refusal to sell was that the land would be excluded from the project.[37] This agreement-to-dispose provision was the model for the current excess-land law.[38]

Formidable as these provisions might seem, they were quite ineffective; an independent fact-finding commission reported in 1924 that, in its antimonopoly and antispeculation purposes, the reclamation law had failed.[39] The basic reasons for failure were these: first, the arrangement used for controlling the sale price did not prevent sales to middlemen who were free to resell without restriction;[40] second, and perhaps even more important, sales of excess lands were required only after the issuance of public notice, which was often delayed indefinitely, and the law was interpreted to permit the delivery of water to excess lands prior

[33]Act of August 9, 1912, ch. 278, § 3, 37 Stat. 266, 43 U.S.C. 544.

[34]The relevant sections of the 1914 law were: Act of August 13, 1914, ch. 247, §§ 8, 9, 12, 38 Stat. 688, 689, 43 U.S.C. 440, 464 418.

[35]Act of August 13, 1914, ch. 247, § 8, 38 Stat. 688, 43 U.S.C. 440.

[36]Act of August 13, 1914, ch. 247, § 9, 38 Stat. 689, 43 U.S.C. 464.

[37]Act of August 13, 1914, ch. 247, § 12, 38 Stat. 689, 43 U.S.C. 418.

[38]The current governing provision is § 46 of the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 649, as amended, 43 U.S.C. 423e.

[39]*Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Congress, 1st Sess. (1924).

[40]*Landownership Survey*, p. 42.

to their sale.[41] Excess-land owners were thus able to receive project water for their excess lands for very long periods—precisely the result the reclamation law was designed to prevent; and when they did sell, they were able to reap as speculative profit the capitalized value of the federal subsidy. It need hardly be said that these results were due to more than merely technical loopholes in the statutes. Then, as now, administrative interpretation and enforcement of the excess-land law was less than vigorous.[42]

The law took its present statutory form in 1926.[43]

Other commentators have emphasized the clear and unequivocal purpose of the law to encourage and maintain family-sized farms for persons who live on their subsidized land. On February 6, 1902, one of the co-sponsors of the National Reclamation Act, Senator Hansbrough of North Dakota, introduced the reclamation bill in the Senate in these words:

> Mr. President, the purpose of this measure is to assist in providing homes for the rapidly increasing population of the country. 35 Cong. Rec. 6734 (1902).

One supporter of the original legislation, Congressman Frank Mondell of Wyoming, praised the 1902 legislation:

> It is a step in advance of any legislation we have ever had in guarding *against the possibility* of speculative landholdings and *in providing for small farms and homes* on the public land, while it will also compel the division into small holdings of any large areas

[41]Ibid.

[42]*Acreage Limitation Policy*, p. xiii:

> In the 35 years since the last iteration by Congress of the principle of land limitation, both Congress and the executive branch have on occasion exhibited a degree of concern for the excess-land owner which may be difficult to reconcile with the policies embraced by the excess-land laws.

[43]Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, as amended, 43 U.S.C. 423e.

. . . in private ownership which may be irrigated under its provisions. 35 Cong. Rec. 6677 (1902), [emphasis added].

The House Committee Report on the 1902 Act made it crystal clear that the purpose of the new legislation had as its prime purpose the irrigation of lands for actual settlers. The report noted that all major political parties had declared themselves in favor of this vast new undertaking by the National Government.

> No more defendable measure has ever been presented to any Congress. No measure relating to the settlement and development of the public lands has ever been so carefully guarded in the interest of the homemaker and against the designs of the speculative entryman. No legislation presented to an American Congress has had all of its provisions more carefully and totally considered in all of their hearings. *Reclamation of Arid Lands,* Committee on Arid Lands, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 4-5 (1902).

The report noted that the bill was carefully considered against the accumulation of large holdings of irrigated lands in single ownership and would compel the breaking up of large tracts by "limiting the area of lands the property of any one landowner for which a water right may be acquired to 160 acres and requiring residence or occupancy of the land by the owner. No non-resident can secure a water right." *Id.* at 8.

> To aid in the reclamation of the desert and in establishing there a home-owning population will not only vastly increase the strength and prosperity of the entire nation, but is a duty which the Government cannot escape, which is paramount in importance to every other duty now laid upon the American people. *Id.* at 16-17.

The object of the legislation was never in doubt.

> The object of the Reclamation Act is not so much to irrigate the land as it is to make homes. President (Theodore) Roosevelt in his message to this Congress today and in every previous message to this Congress and to the Congress of the United States, has emphasized again and again that the primary object of the law was to make homes. It is not to irrigate the lands which now belong to large corporations, or even to small ones; it is not to make these men wealthy; but it is to bring about a condition whereby that land shall be put into the hands of the small owner, whereby the man with the family can get enough land to support that family, to become a good citizen and to have all the comforts and necessities which rightfully belong to an American citizen. Graham, *The Central Valley Project, Resource Development of a Natural Basin,* 38 Cal.L.Rev. 588, 617, n.95 (1950), quoting F. M. Newell, first head of the Reclamation Service, and Citing Official Proceedings of the National Irrigation Congress 28 (1905).

In the respected commentary recognized as authoritative on the reclamation law by this Court[44] and others,[45] *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477 (1955), Paul S. Taylor reports as follows:

> On May 12, 1903, President Theodore Roosevelt addressed the students at Stanford University on conservation. After noting that the early land laws had been "twisted to an improper use so that . . . they tend

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[44] *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 292 (1958).

[45] *Ivanhoe Irrig. Dist. v. All Parties,* 53 Cal.2d 692, 707, n. 4, Cal. Rptr. 317, 350 P.2d 69 (1960); *State of Washington v. Udall,* 417 F.2d 1310, 1312, n. 1, (9th Cir. 1969); *Israel v. Morton,* 549 F.2d 128, 133 n. 3 (9th Cir. 1977) *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1140, n. 185, (9th Cir. 1976), *cert. denied,* 429 U.S. 1121; *Yellen v. Hickel,* 335 F.Supp. 200, 208 (S.D. Cal. 1971), *vacated sub nom; Yellen v. Andrus,* 559 F.2d 509 (9th Cir. 1977); and the opinion of the Ninth Circuit in the case at bench, 559 F.2d at 521.

to create a class of men who . . . obtain large tracts of soil for speculative purposes, or to rent out to others," he charged the students to take leadership in "securing the right use of the waters, and of seeing to it that our land policy is not twisted from its original purpose, but is perpetuated . . . to turn the public domain into farms each to be the property of the man who actually tills it and makes his home on it." He put his finger upon the crucial weakness, saying that "good laws alone will not secure good administration," and adding, two days later in San Francisco, that "no public man worth his salt will be other than glad to be held accountable" by a private citizen.

Less than a year earlier President Roosevelt had signed the National Reclamation Bill to accomplish the very objectives he described at Stanford. "If it was not for the national irrigation act, we would be about past the time when Uncle Sam could give every man a farm." Under that law, the federal government undertook to prepare arid lands for settlement by constructing reservoirs and canals. In order to bring the price within reach of the settlers, it advanced the cost of construction free of interest, the capital alone to be repaid, and that only after a period of years. Public lands so irrigated were to be distributed in small units to actual settlers under the Homestead laws, and private lands were to receive water in limited quantities. The urge was strong to repair the damage of "laws twisted into an improper use," to curb land monopoly and to favor the homemakers. *Id.*, at p. 479.

Because of the inadequacy of anti-speculation clauses and the unrealistic harshness of the repayment formula in the original act, financial disaster struck the reclamation program. Professor Sax discussed the purposes of the remedial legislation leading up to the enactment of Section 46 of the Omnibus Adjustment Act of 1926:

> The rate of economic failures created by the combination of land speculation and a rigid repayment

schedule was tremendous, and the settlers naturally turned to Congress for relief. The precise question was whether the repayment obligation should be reduced in order to permit the settlers on the projects to survive financially, but at the same time to permit the selling landowners to reap their profits.

In the context in which the problem arose, the solution seemed easy. Those who had been profiting at the expense of the repayment fund, were principally large landowners and speculators whom there was neither need nor desire to aid. They were merely parasites—real estate manipulators who, without ever settling on or improving the land themselves, reaped enormous profits from the enthusiasm and naivete of the true settlers to whom they sold. The need appeared to be merely to get the land into the hands of genuine settlers with dispatch, and at reasonable prices. Once that had been done and the speculators had been squeezed out, the basic structure of the reclamation plan could go forward as originally planned. The true settlers would prosper, and the investment of the United States would be once again secure. Sax, *Selling Reclamation Water Rights; A Case Study in Federal Subsidy Policy,* 64 Mich.L.Rev. 13, 17-18 (1965).

3. THE RECLAMATION PROGRAM AND PRIVATE LANDS.

The Reclamation Act, originally enacted in 1902 and supplemented on numerous occasions thereafter, provides in general for the construction and operation by the Government of various dams and appurtenant facilities for the purpose of storing, conserving and regulating the supply of water in the Western states. Although couched in terms which appear to limit its application to the "re-claiming" of arid public lands, privately owned lands having privately developed means of irrigation have been brought into reclamation projects almost from the beginning of the reclamation program in 1902. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 283 (1958); *United States v. Tulare*

Lake Canal Co., 535 F.2d 1093, 1112 (9th Cir. 1977), *cert. denied*, 429 U.S. 1121. As far back as 1903, the First Annual Report of the Reclamation Service said:

> Recognizing the fact that there is scarcely a section of the country in the United States, even in the most sparsely settled regions of the West, where an irrigation project would not involve the reclamation of lands in *private ownership*, as well as those belonging to the United States, this section [§ 5 of the 1902 Act, 32 Stat. 389, 43 U.S.C. § 431] authorizes the sale of the right to use water for land in private ownership, to be limited, however, to the amount required for a tract not exceeding 160 acres. (emphasis added). *First Annual Report of the Reclamation Service*, H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902).

Landowners have distorted the legislative policy of the Reclamation Act respecting private lands. By picking out bits and pieces of testimony from what they consider to be the legislative history of the reclamation program completely out of context, they imply that the obligations of § 46 were never intended to apply to privately owned lands previously developed by private means. L.Br. 20. With specific reference to § 46 of the 1926 Act, they rely on out of context references in Congressional committee proceedings in 1924, arguing that § 46 "envisioned sales of idle sage brush land acquired by speculators at prices like $5 per acre; they did not contemplate forced divestiture of cultivated lands owned by bona fide farmers, at appraised prices far below the investment costs of the farmer-owner." *Ibid.* The actual history of § 46 is radically different. In discussing the application of § 46, Congressman Crampton spoke of one of the new projects under consideration by Congress. He pointed out the new legislation was expected to cover situations exactly like those existing in the Imperial Valley:

> As to the Salt Lake project. The original purpose of reclamation was to develop the public lands of the West: To provide cheap homes to settlers; to take care of reclamation problems where several States were involved and the interstate rights might come into play; or tremendously large projects like the Boulder Canyon projects, where many States are involved and the expenditure is enormous, or where other problems, such as power and its proper conservation for the public use came into play. The Salt Lake project, as I understand it, is this: An area of land, entirely in private ownership and entirely settled and under irrigation, has an insufficient water supply for the whole season. They desire to turn from field crops that mature early to garden truck, and so forth, which would require a longer growing season; but their water supply fails them in early July. 66 Cong. Rec. 85-86 (1924), Pl. Ex. 67e.

If privately developed lands were to be exempt from § 46 or any other provisions of reclamation law, presumably landowners would have no difficulty providing ample citations to supporting authority. The reason for this shortcoming is obvious. The statistics of private lands participating in the reclamation program speak for themselves.

On the 25 reclamation projects authorized in 1910, one-half the irrigable acreage was privately owned prior to the authorization of the projects, and two-thirds were privately owned by the time water was available.[46] The committee of experts, known as the "Fact Finders," appointed by Secretary of Interior Hubert Work to advise him about needed changes in the reclamation program, reported that by 1922, 83 per cent of the acreage irrigated under the reclamation program was privately owned land.[47] The Fact

[46] *Fund For Reclamation of Arid Lands*, H.R. Doc. No. 1262, 61st Cong. 3d Sess. 20-21 (1911).

[47] *Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Cong., 1st Sess. 133 (1924).

Finders also reported that about 60 per cent of all land being irrigated at that time from government works was privately owned at the time of opening.[48]

The Fact Finders went on to state that large areas of land were "brought under irrigation by private ventures . . . [but] had an insufficient water supply for full-crop production. Usually this insufficiency was due to a water shortage at the critical growing period."[49] They reported that the reclamation service found "many meritorious private projects which were in trouble" and which "usually needed a better water supply or were in debt and unable to complete the work. There were many cogent reasons why the service should look with favor on a policy which would rescue these enterprises from threatened disaster. In some cases they had marked advantages over any new works on public land."[50]

They accurately observed, "the situation created by the inclusion of privately owned land in Government projects deserves more attention that it has received."[51] The Fact Finders Report makes it crystal clear that private lands constituted a major portion of the reclamation program.[51a]

It is significant that the subject bill of the 1924 hearings to which landowners made reference, H.R. 8836, (L.Br. 20) was the Act of December 5, 1924, known as the Fact Finders' Act, 43 Stat. 701, 43 U.S.C. §§ 371, 376, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501 and 526. The legislative history of that Act shows that lands developed privately were to be included within projects and the value of those private improvements were to be considered in

[48] *Id.* at 124.
[49] *Id.* at 61.
[50] *Id.* at 131.
[51] *Id.* at 124.
[51a] *Id.* at 4, 116, 132-33.

determining the appraised value for purposes of selling excess lands. *Hearings on H.R. 8836 and H.R. 9611,* Before House Comm. on Irrig. and Reclamation, 68th Cong., 1st Sess. 40-41, 330, 331, 334 (1944).

As a result of the Fact Finders Report and its recommendations, Congress enacted § 46 of the Omnibus Adjustment Act in 1926. Nowhere in the legislative history of Section 46 or of any other provision of reclamation law is there a distinction between private and public lands or between lands that are developed and not developed.

The existence of pre-project irrigation facilities, such as those in the Imperial Valley and elsewhere, is without significance when considering the application of reclamation law. This Court has already concluded that § 46 applies even though the area had been reclaimed by private means. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. at 283. Bringing "new water" to an area is not the only, or even the primary, benefit of the reclamation program. The regulated flow of stored water is the major benefit of a reclamation project. *United States v. Tulare Lake Canal Co.,* 535 F.2d at 1113.

4. THE RECORDABLE CONTRACT UNDER RECLAMATION LAW.

The recordable contract found in § 46 is a statutory device unique in the law. Under reclamation law, owners of farmland may receive project water for up to 160 acres in an individual ownership. If they want to receive the water subsidy for their excess lands, § 46 provides that they must execute "valid recordable contracts for the sale of such (excess) lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior". The sale price is to be determined by an appraisal "in

a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works". Under the specific terms of § 46, excess lands are to be sold at "ex-contract" or below market prices. After there has been an initial breakup of excess landholdings, the price control mechanism of § 46 applies until one-half of the construction costs of the irrigation works have been repaid.[52]

The Secretary in authorized by § 10 of the 1902 Act to adopt regulations for carrying out the purposes of the Act. 32 Stat. 390, 43 U.S.C. § 373. On August 22, 1977, acting under his statutory authority in response to an order of a federal district court in the District of Columbia,[53] the Secretary announced proposed regulations for implementing the mandate of reclamation law and further defining the procedures to be followed with respect to the recordable contract.[54] In pertinent part, the Secretary summarized the regulations as defining "more specifically the procedure by which excess lands should be sold and who can qualify as purchasers to fulfill the purpose of reclamation law so that low-priced federal water be used as a means of encouraging the establishment of genuine small family farms."[55] Specific procedures provide for placing "limitations on the leasing of both excess and non-excess

[52]The statutory and administrative background of the recordable contract provision of § 46 was analyzed in great detail by Chief Judge Browning in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1118-1144 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121.

[53]*National Land for People, Inc. v. The Bureau of Reclamation*, Civil Action No. 76-928.

[54]43 C.F.R. § 426, Dist.App. 217a.

[55]*Id.*, Dist.App. 218a.

land benefited by low-priced federal water",[56] and, of particular significance to the case at bench:

> The regulations alter the procedures by which excess land are sold, to allow a large number of prospective purchasers a better opportunity to participate in the reclamation program. For example, the past practice of allowing an excess land seller to arrange privately for sale is abolished. The Department will announce the availability of such lands, and choose among prospective purchasers by lottery or other impartial means.[57]

The Secretary recognized the policy objectives of the Reclamation Act of limiting the area of land for which water may be supplied and requiring the landowner-recipients of the water subsidy to reside on or in the neighborhood of the land to be irrigated:

> (a) To provide opportunity for a maximum number of farmers on the land.
>
> (b) To provide widely the benefits from public-supported reclamation because interest-free money and low-priced water are involved.
>
> (c) To promote the family-sized owner-operated farm.
>
> (d) To preclude the accrual of speculative gain in the disposition of excess land. § 426.1, Dist. App. 221a-222a.

An "eligible nonexcess owner" is defined as an individual "who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of acquisition of the land; (2) will not, after the acquisition, be the owner of more than 160 acres of land which receives water from any

[56]*Id.*, Dist.App. 219a.

[57]*Ibid.*

Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules." § 426.4(1), Dist. App. 229a.

Water may be delivered to excess land "only if the owner, under terms and conditions satisfactory to the Secretary, executes a valid recordable contract for the sale of that land to a nonexcess owner. The sale price must not reflect value that can be attributed to the construction of the project." § 426.5(a), Dist. App. 230a-231a.

Under the *Tulare* formula (*United States v. Tulare Lake Canal Co.*, 535 F.2d at 1118-1144), the Secretary will exercise price approval for "all land under recordable contract, regardless of status of payment of construction charges". § 426.10(a)(2), Dist. App. 237a. Only excess lands are subject to the recordable contract. To provide against possible speculation in the resale of excess lands after the initial breakup, the regulations follow the requirement of § 46 in providing for price control by the Secretary "until one-half of the total construction costs allocated to irrigation have been paid." § 426.10(a)(1), Dist. App. 237a.

The practice of the Secretary has been to allow an excess landowner 10 years to dispose of his excess lands. Of course, he would be provided the water subsidy during this time. If there was any suggestion of possible reluctance on the part of large landowners to execute recordable contracts because of hardship or any other reason, it was removed in these eloquent terms by the Chief Counsel for the Imperial Irrigation District in congressional testimony:

> Let us lay the cards on the table . . . I will give you my own opinion of Jack O'Neill's willingness to sign the 160 acre limitation. He thinks if he gets water for ten years on there without having to sell it, he can make enough money out of it so he can afford to sell it at any old price. *Hearings on S. 1425, 2541, 3448,* Before Sub-comm. on Irrigation and Reclamation of Sen. Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 87, 88 (1958).

5. THE BOULDER CANYON PROJECT ACT AND THE IMPERIAL VALLEY.

The development of one part of the Colorado Desert into the lush Imperial Valley and the taming of the once wild and erratic Colorado River, are reported elsewhere in great detail.[58] It is virtually impossible to over-estimate the need for the Colorado River for the life of the Imperial Valley. In large portions of the lower basin, true desert conditions prevail and, without the resources of the Colorado River system, now entirely dependent upon the Project Act, human life could not be maintained in these areas. Report of the Special Master 15.

The Colorado River has been called the "river of controversy" and has become one of the most litigated, regulated and argued about rivers in the world.[59] It was to the Colorado River where Californians initially turned for the means of opening the rich desert lands of the Imperial, Coachella, and Palo Verde Valleys to agriculture.

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[58] *Arizona v. California*, 373 U.S. 546, 552-64 (1963); Report of the Special Master in *Arizona v. California*, No. 10 Original, 15-44, 53-55; Gates, *History of Public Land Law Development*, 635-98 (1968); 3 *Kinney Law of Irrigation and Water Rights and the Arid Region Doctrine of Appropriation of Water*, 2237-46 (1912); Taylor, *Water, Land, and Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 Natural Resources J. 1 (1973); the opinion of the district court, 352 F.Supp. at 1312-17; the opinion of the Ninth Circuit, 559 F.2d at 514-15; *Yellen v. Hickel, supra*, 352 F.Supp. at 1312-16; a Stipulation of Facts found in the record at 2 CR 6-24; California Water Atlas, 38-39 (1979); Hundley, *Water and the West* (1975); Caughey, *California* 480-83 (1940); Watkins, *Illustrated History of California*, 307-312, 385-391 (1973); Poli, *Landownership and Operating Tenure in Imperial Valley, California*, U.S. Department of Agriculture, Berkeley, Calif. (1942); *Report of the All-American Canal Board*, S.Doc. 109, 66th Cong., 1st Sess., 17-21 (1919), Pl. Ex. 59.

[59] California Water Atlas 38-39 (1979).

The first person who conceived of irrigating the Imperial Valley with a gravity-fed canal from the Colorado was Oliver M. Wozencraft, a one-time Indian agent who conceived of this idea as he crossed through the area on his way to the gold fields in 1849. It was reported that his scheme floundered upon his determination to own not only the water system but the land it serves as well. Although the State legislature endorsed his request for a Federal grant of 1,600 square miles of the public domain in 1859, Congress refused to go along.[60]

In 1896, the California Development Company was organized under the laws of New Jersey by Charles R. Rockwood and C. N. Perry, construction engineers for the Southern Pacific Railroad, and Anthony Heber and Samuel Fergusson, land agents for the Kern County Land Company, for the purpose of diverting water from the Colorado River to irrigate the arid lands in the Imperial Valley and Republic of Mexico. It was considered necessary at that time, in order to irrigate lands in the Imperial Valley, to divert Colorado River water via the bed of an ancient overflow channel known as the Alamo River through Mexico and then back in a northerly direction into the United States.[61]

In order to provide for the passage of water first south into Mexico and then, after passing through the Alamo Canal back into the Imperial Valley, the California Development Company organized a Mexican company in 1898 named La Sociedad de Yrrigacion y Terrenos de la Baja California. The stock of the Mexican company was wholly

[60] *Id.* at 39.

[61] *Id.* at 39; 2 CR 11; Watkins, *California: An Illustrated History*, 308 (1973), hereafter "Watkins"; Taylor, *Water, Land and Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 Natural Resources J. 1, 4 (1973), hereafter "Water, Land and Environment", citing Hosmer, *Triumph and Failure in the Colorado Desert*, 3 American West 34, 38-39 (1966).

owned by the California Development Company and in 1900, the Mexican company held title to approximately 100,000 acres of land in Baja, California. The California Development Company and its wholly-owned Mexican company entered into a contract on December 28, 1900 wherein the California Development Company seeded 7,240,000 acre feet of water annually to the Mexican company, to permit the latter to irrigate Baja California lands in consideration for the Mexican company's promise to deliver water at a re-entry point on the international border.[62]

To promote the development of the land in the Imperial Valley, a colonization agency called the Imperial Land Company was incorporated in 1900 by the California Development Company. This corporation contracted to make all necessary land surveys, to do all advertising and colonizing, and to sell all water stock. In return for its services, it was to receive a percentage of the gross sales of water stock and was allowed to acquire and own townsites in the Valley. Through the use of government land scrip, the agency obtained immediate ownership in fee simple of tracts of land in various parts of the Valley which it subdivided into townsites.[63]

With the exception of land granted to the state for educational purposes (about 26,000 acres) and land granted to Southern Pacific Railroad (about 83,000 acres) before 1900, all other land in the Imperial Valley was public domain. While the irrigation canal was being constructed through Mexico, a large number of individuals, some of whom were employed by the construction company, anticipated the arrival of water by filing entries on government land.

[62] 2 CR 7.

[63] Watkins, *supra*, at 310; Poli, *Land Ownership and Operating Tenure in Imperial Valley, California*, 12-13 (U.S. Department of Agriculture, Berkeley, Calif. 1942), hereafter "Poli".

Some of the applications were received by the United States Land Office as early as March 1900. Most of the land in the Valley was subsequently acquired by filing entries with the land office, principally under provisions of the Homestead and Desert Land Acts and the land was obtained largely in tracts of 80, 160 and 320 acres. Some land was also acquired through the use of government land scrip. Much of the railroad and school land previously granted was subdivided and sold during a period of agricultural development. In this way, acquisition of land took place quite rapidly and by the end of the first year it is estimated that entries had been filed on some 78,000 acres of farm land.[64]

Before 1901, the Imperial Valley was virtually an uninhabited desert. The desert basin, then referred to as the "Salton Sink," had been visited by Spanish explorers as early as the 16th century and by members of several military expeditions who had crossed the desert region during the early part of the 19th century. In the 1850s, a stage line which traversed the southern part of the desert from the Pacific Coast to Yuma, Arizona, and later extended to St. Louis, Missouri, was established and its operation continued until the completion of the Southern Pacific Railroad Co.'s line from Yuma to Los Angeles. The stage and railroad stations which were established at various points in the desert constituted one of the earliest forms of settlement.[65]

In July 1901, water was diverted from the River through Hanlon's Heading, a temporary diversion point located a few hundred feet north of the Mexican border into the Imperial Valley via the Alamo Canal which followed the bed of the Alamo River immediately south of the bor-

[64]Poli at 13.

[65]*Id.* at 12.

der.[66] George T. Chaffey, an engineer who was a well known irrigator of the time, was retained by Rockwood to construct the diversion facilities. He soon discovered that the California Development Company did not have the promised option on the diversion point at Hanlon's Heading, that it did not have the represented right of way through Mexico, that it was bankrupt and in jeopardy of losing its charter and that it was obligated to accept $350,000 worth of land scrip at par which was about 10 times the market value.[67] Since the California Development Company had no money to pay for construction, Chaffey raised his own money and proceeded to develop the canal route through Mexico to bring water to the Imperial Valley. He sold his interest back to the California Development Company in 1905 as the population of the Valley began to grow.[68]

From the very beginning of the development of the Imperial Valley, there was uncertainty over the continued supply of irrigation water from the Colorado River. It was recognized that federal aid would require application of the reclamation law and its anti-monopoly and anti-speculation provisions.

As a "navigable stream", U.S.Const. art. 1, § 8, the Colorado River was subject to federal regulation. There was considerable doubt as to the right of the California Development Company to make diversions from the River and it became difficult for the California Development Company to raise capital. Efforts to have Congress declare the Colorado River "non-navigable" and thus beyond federal jurisdiction were not successful.[69] During

[66]2 CR 12.

[67]Caughey, *California*, 483 (1940), hereafter "Caughey".

[68]Watkins, *supra* at 310; Caughey, *supra* at 484.

[69]*Water, Land and Environment, supra*, 13 National Resources J. at 5; H.R. 13627, 58th Cong., 2d Sess. (1904).

the hearings on the proposed legislation, one witness testified:

> The bankers tell me, "You get Congress to simply declare that stream is not navigable, and then you can have all the money you want."[70]

A proposal was shortly thereafter submitted requesting the government to purchase the property and water rights of the California Development Company. 2 CR 13. In a report by the Director of the Geological survey of January 4, 1905, it was noted that the Department of Agriculture had made unfavorable reports "concerning the agricultural possibilities of these lands on account of their conditions and the present desperate situation of many of their inhabitants". 33 L.D. 391, 401, Pl.Ex. 73.

> The lands for the most part have now passed into the hands of individuals in relatively large tracts—upwards of 320 acres or even more, and many of the owners do not live in the valley, *while the reclamation act if applied to this district would limit the holdings to 160 acres and require residence in the vicinity. Ibid.* (Emphasis supplied).

Even though Rockwood established a claim to 10,000 cubic feet of water per second in 1899, the United States government refused to approve his diversions from the river in 1904. When he filed for his diversions, he overlooked the fact that the government of the United States, as well as that of Mexico, considered the Colorado to be a navigable stream and permission to divert water had to be obtained from the Department of War and he had neglected to do so. In 1903, the Reclamation Service announced that the California Development Company's diversions were illegal.[71]

[70] *Water, Land and Environment, supra,* 13 Natural Resources J. at 5, citing *Hearings Before House Committee on Irrigation of Arid Lands,* H.R. Doc. No. 13627, 58th Cong., 2d Sess. 60 (1904).

[71] Hundley, *Water and the West* 24 (1975), hereafter "Hundley".

Disaster finally struck in 1905. Because of silt clogging at Hanlon's Heading, engineers with the California Development Company opened a new and dangerous intake and at the next high water the River broke through and began to pour all of its water into the Imperial Valley. Salton Sink changed into the Salton Sea, the Southern Pacific Railroad was forced to move its tracks and the Imperial Valley was threatened with complete inundation. The California Development Company's resources were entirely inadequate for damming a river 25,000 feet wide and 30 feet deep. In June, 1905 the Company transferred its assets and the responsibility of stopping the flood to the Southern Pacific. The railroad engineers made two aborted attempts later in the summer of 1905 and early in 1906 constructed a quarter million dollar dam which was washed out by the first summer flood. Appeals to President Roosevelt were fruitless because the actual break was below the border in Mexico. The President later characterized the California Development Company's diversion efforts in Mexico as "criminal negligence". In the winter of 1906-07 the railroad tried again and after a heroic 52-day drive, involving, 6,000 car loads of rock and gravel and 12,000 piles and costing $1,600,000 the railroad finally closed the break and saved the Imperial Valley.[72]

In 1907, the California Development Company was bankrupted by the destruction and inundation of its diversion system and a Receiver was appointed. The position of the Valley, located a few hundred feet below the level of the River, denied its residents complete ease of mind until 30 years later when Boulder Dam brought the River under control.[72a]

[72] Caughey, *supra,* at 484; California Water Atlas at 39; S. Doc. No. 212, 59th Cong., 2d Sess. 5-6 (1907).

[72a] 2 CR 14.

Congress authorized several appropriations for flood control following the 1905 flood, including $1 million appropriated in 1910 for the purpose of protecting the lands and property in the Imperial Valley and elsewhere along the Colorado River, ". . . against injury or destruction by reason of the changes in the channels of the Colorado River . . ."[73] However, the situation became untenable because of harassment by Mexican officials. In 1915 Congress ended its aid and refused to spend more money, thus forcing Valley residents to shoulder the burden of flood control in Mexico.[74]

In 1911 and 1914, revolutionary conditions in Mexico threatened to disrupt the water supply. At one point in 1914, following the American invasion of Vera Cruz, about 600 Mexican soldiers, armed with machine guns, camped just across the border. In response to the Valley's frantic calls for help, the California Governor sent a battalion of the State militia into the area and it was quickly joined by a volunteer calvary troop of local residents. Valley settlers were prepared to invade Mexico to protect their water supply.[75]

Other unsettling conditions in Mexico also had disconcerting effects. Dead horses and mules were often found in the canal as were bodies of the victims of the revolution. Since Valley residents took most of their household water from the canal, they were understandably upset. In addition, they were alarmed by Mexico's refusal to play a decisive role in helping to check the flood threat below the border.[75a]

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[73]Act of June 25, 1910, 36 Stat. 883.

[74]Hundley, *supra*, at 31.

[75]*Id.* at 30.

[75a]*Id.* at 30-31.

Farmers in the Imperial Valley watched the cost of protective work increase from $100,000 in 1915 to nearly a million dollars in 1916. The expense hovered around $500,000 during the next four years. At the same time, perhaps as much as 30 to 40 percent of the water was lost through seepage and evaporation in Mexico where the Canal's poorly defined banks merged with nearby sloughs and swampy areas.[76] Assessments for the cost of strengthening and extending levees made necessary by the increase of silt, which raised the bed of the river and posed the threat of a major flood, increased from seventy cents for each one hundred dollars of assessed valuation in 1915 to three dollars and twenty-five cents in 1918, nearly a five fold increase in three years.[77]

Mexico refused to share in the cost of the levees below the border even though the levees protected Mexican as well as American land. The Mexicans also imposed duties on equipment, rock and animals used in protective work south of the border. In addition, plans and specifications for improvements had to be cleared with officials in Mexico City, which led to costly delays and saddled the Valley with two masters—California's State Engineer and a Mexican official—who often disagreed how Valley engineers should proceed.[78]

By the latter part of the decade of 1910-1920, it became obvious that private irrigation efforts were of limited effectiveness and Imperial Valley residents recognized their

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[76]*Id.* at 31-32.

[77]*Id.* at 32.

[78]*Id.* at 32. Although the Colorado River Land Company, an American syndicate, owned 840,000 acres in Mexico, Imperial Valley farmers were incensed because that land was leased piecemeal to Mexican, Japanese and Chinese farmers. Farmers in the Imperial Valley accused the Colorado River Land Company of giving to "Japs and Chinamen" water which properly belonged to "red-blooded, free Americans". *Id.* at 33.

inability to cope with their problems in controlling and using the Colorado River. They turned to Congress for complete relief. In 1916, the interests of the California Development Company, then in the hands of the Southern Pacific Company by foreclosure, passed to the Imperial Irrigation District.[79] On February 16, 1918, the government and the Imperial Irrigation District entered into a contract calling for a feasibility study on the District's proposal for the construction of an All-American canal to connect the arid lands in the Imperial Valley with Laguna Dam.[80]

In the 1920's Imperial Valley interests continued their quest for federal aid with increasing intensity, ultimately resulting in passage of the Boulder Canyon Project Act on December 21, 1928. *Arizona v. California*, 373 U.S. 546, 552-53 (1963). Federal aid under the reclamation program was inevitable. Illustrative of the position of the District when it was urging Congress to build Boulder Dam and the All-American Canal, is the statement of Charles Childers, its attorney:

> We are in desperate need of flood protection today, and have been for years. Imperial Valley stands in a position to be destroyed at any time, and has been in that position for years.
>
> * * *
>
> In addition, the flood problem on the Colorado, as you so well know, involves a silt problem and even the construction of a small dam, one where the gates must be kept open, does not solve our flood problem down below. It must be such a dam as will now and forever retain that great quantity of silt and release substantially clear water, that will finally solve our problem . . . California finds itself in the position of desperate need. The water that was appropriated away back yonder is being used today in other states, and because of that condition *we are finding ourselves faced annually with the specter of a great drought. We are in desperate need of stored water. Hearings on S. 728 and S. 1274* Before Senate Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 326-27 (1928). (Emphasis supplied)

[79] 2 CR 14.

[80] *Ibid.*

Prior to completion of the high dam at Black Canyon in 1935 and the All-American Canal in 1940, privately financed irrigation efforts proved totally unsatisfactory. The foregoing summary of the Valley's problems only touched the surface. The record shows that the Imperial Valley was, in the words of the Fact Finders, one of "many private projects which [was] in trouble" and "needed a better water supply . . . and . . . there were many cogent reasons why the service should look with favor on a policy which would rescue [this] enterprise[s] from threatened disaster".[81]

a. Landowners' Benefits From the Regulation of the Colorado River.

The landowners claim that they were "victims of any land speculation which may have occurred in the 1930's and 1940's." L.Br. 20. If, in fact, some of the landowners trace their roots back to the colonizers of 1901, they would hardly have suffered financially from the project. It may be well to examine how the excess landowners have been victimized by the Project Act.

John R. Riter, a professional engineer employed by the Bureau of Reclamation, testified concerning the regulated flow of the Colorado River resulting from the project.[82]

[81] *Supra*, note 50.

[82] The primary benefit of a reclamation project is a regulated water supply. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1144.

The flow of the River "is characterized as erratic. It varies in rate of discharge considerably from year to year, as well as within the year".[83] In the 33-year period from 1902 to 1934, before construction of Lake Mead, there were annual flows ranging from about 22 million acre-feet in 1909 to less than 3 million acre-feet in 1934. The average flow for this period was about 15-million acre feet.[84] The River was "a heavy, heavy carrier of silt" before construction of the project.[85]

While the River was in its natural state, there was an inadequate flow to meet the irrigation needs of the District in times of drought. In times of flood there was a threat that the River would shift its course, making it difficult to maintain a heading for the District canal. There was also the threat that its course would shift and flow into the Imperial Valley, as occurred in 1905. The large volumes of sediments carried by the River aggravated the problem.[86]

Prior to construction of Hoover Dam, the total estimated shortage in the months of June to November in 1934 was nearly 800,000 acre feet in the District.[87] It was estimated that had there been no regulation of the River at Lake Mead, there would have been a shortage of approximately 560,000 acre-feet in the months of March, July, August, September and October, 1956.[88] Had it not been for the project, there would have been significant water shortages in at least one month in twenty-two of the years between 1935 to 1968, and in nine of those years there would have been significant shortages in at least two months. In seven of those years, there would have been significant shortage

[83]4 Tr. 429:17-22.
[84]*Id.*, 429:23-430:3.
[85]*Id.*, 430:9-12.
[86]*Id.*, 430:23-431:14.
[87]*Id.*, 433:20-435:13; Pl. Ex. 2.
[88]4 Tr. 435:14-436:18; Pl. Ex. 3.

in at least three months.[89] If there had not been a project, shortages would have been more frequent in recent years because of the decreased run-off.[90] Although there have been major floods on the Colorado River since Hoover Dam went into operation in 1935, there have been no adverse effects in the District.[91]

In addition to the regulated flow of the River and the removal of the ever-present threat of floods, the economic benefits to the landowners of the Imperial Valley have been phenomenal. Edmund Barbour, an economist with the Bureau of Reclamation, testified both to the losses incurred prior to completion of Hoover Dam and the benefits acquired thereafter. In 1934, there was a drought and agricultural losses approximated $10 million dollars. This was a 25 per cent loss in the value of agricultural commodities due to the water shortage that year.[92] Had there not been for the project, there would have been a loss of the total agricultural value of commodities produced in the District of $95 million dollars because of water shortages in 1940, 1944, 1948, 1956, 1960, 1963 and 1966.[93]

The value of agricultural commodities prior to 1940 varied between $20 and $40 million dollars. Thereafter, the values gradually increased to $140 million dollars between 1952 and 1958 and then moved up to approximately $220 million dollars at the time of trial in 1970.[94] The average crop value increased from $107.00 per acre in 1942 by approximately three and a half times, to $346.00 per acre in 1967.[95] Other direct financial benefits to the landowners of the Valley were described in a report to the House Com-

[89]4 Tr. 437:12-438:5; Pl. Ex. 4.
[90]4 Tr. 439:22-440:14.
[91]*Id.*, 441:11-442:22.
[92]*Id.*, 454-10-16.
[93]*Id.*, 454:23-455:3.
[94]*Id.*, 456:2-18; Pl. Ex. 7.
[95]*Id.*, 457:23-458:8.

mittee on Interior and Insular Affairs in 1956, showing the increases in productivity, which were direct contributions of the project, and were summarized in these terms:

> With an assured water supply, increase in production of farm crops in the Imperial Valley has been phenomenal. Field crops valued at only $5,321,000.00 in 1940 had increased to $65 million dollars by 1954, or by 1,122%. Vegetable and truck crop values increased from less than $13 million dollars to $34 million dollars, or by 167%. Production of livestock and livestock products was up by 274%, all from an agricultural area which had expanded by only 9% in 14 years, reflecting a significant and very substantial increase in actual per acre productivity. Crop values per cultivated acre increased correspondingly from an average of $53.50 in 1940 to $200.00 in 1954.[96]

In addition, the dependability of the water supply "has also resulted in a more constant acreage devoted to intensive high risk crops which could not be undertaken without a dependable water supply".[97] The report went on to state:

> The deep, rich soils of the Imperial and Coachella Valleys, combined with the favorable geographic location and a dependable water supply provided by the All-American Canal system, make the area one of the richest agricultural empires in existence. Not only are the farmers able to produce two or three crops per year from the same land, but the yield obtained from many of the crops grown are considerably in excess of the average yield for the United States. For instance, the average flax yield per acre in Imperial Valley is 33.8 bushels per acre, which is approximately four

[96] *The Contribution of the All-American Canal System, Boulder Canyon Project, to the Economic Development of the Imperial and Coachella Valleys, Calif., and to the Nation,* Report by Bureau of Reclamation, United States Department of the Interior for the Use of the House Committee on Interior and Insular Affairs 13 (Comm. Print No. 13, 1956), Pl. Ex. 34.

[97] *Id.* at 4.

> times the United States' average of 8.8 bushels per acre. In fact, the world's record yield of flax of some 70 bushels per acre has been established in the Imperial Valley.[98]

With regard to general economic benefits from irrigation, Mr. Barber testified that agricultural values have increased two and a half to three times since completion of the project.[99] The landowners of the District saved $170 million which would have been incurred in agricultural losses relating to twenty-one years of serious water shortages between 1934 and 1968.[100] Silt retention benefits would average $1 million a year in savings to the District and the landowners.[101]

b. Landowners' Benefits From the Interest Free Prepayment of Construction Costs.

The District Brief reports ". . . the payment of one-half of the construction charges [have been made] by the present landowners or their predecessors". Dist. Br. 74. The record is uncontradicted that *all* construction costs have been paid from the sale of electrical energy generated by hydroelectric facilities on the All American Canal. Power operations will provide revenues to take care of the balance of the repayment requirements on the original $25 million interest free obligation of the District.[102] The landowners have paid nothing. This misstatement by the District is curious. While it is true that all of the 75,000 residents of the Valley spent $15 million to construct the hydroelectrical facilities on the All-American Canal,[103] the

[98] *Id.* at 7.

[99] 4 Tr. 476:17-477:1.

[100] *Id.*, 477:10-13.

[101] *Id.*, 477:25-478:2.

[102] *Id.*, 477:17-20; 322 F.Supp. at 14.

[103] 322 F.Supp. at 12.

Bureau of Reclamation spent $1,360,000.00 for the power house structure foundations for the power drops.[104] During the period of construction of the Canal, between 1935 and 1938, there was an unfavorable bond market and the Public Works Administration provided grants of over $2 million and loans of $2½ million for the power drops.[105]

The 1938 Annual Report of the District stated:

> You now own a modern, efficient power service representing, on completion, an investment of $5,360,000.00, more than $2 million of which was a direct gift to you from the Federal government.[106]

Another subsidy is the interest-free loan on the $25 million dollars apportioned to the District for repayment of the cost of constructing the All-American Canal. Through 1970, the interest savings on the repayment contract for the All-American Canal was $37,000,997.00 at 3% interest.[107] The total interest savings at 3% over the pay-off period would amount to $84 million.[108] If interest of 5% was charged, which was the rate of interest for available financing prior to the project, the savings would amount to $91,695,000.00 through 1970. Over the entire contract period, it would amount to $303 million.[109]

The financial benefits to the landowners of the District as a result of the storage and regulation benefits were determined, on a pro rata basis, based upon the cost of constructing Hoover Dam and the Reservoir in Lake Mead, to be $25 million. If that sum was placed in a fund with a then going interest rate of 3%, that would have accumulated to $70 million through 1970. Over the entire

[104] 4 Tr. 458:23-459:11.
[105] *Id.*, 459:23-460:5.
[106] *Id.*, 460:6-10.
[107] *Id.*, 468:13-16.
[108] *Id.*, 468:23-25.
[109] *Id.*, 470:2-17.

pay-off period for the All-American Canal facilities, the value of that accumulation would come to $175 million. In 1970, the 5% figure would have been approximately $138 million, and over the pay-off period it would have been $467 million.[110]

Finally, to put frosting on the cake, it is anticipated that none of the construction costs will actually be passed on to the landowners of the District. Their benefits would therefore include both savings of principal and interest, and at 3% over the pay-off period this would amount to $115 million, and at 5%, over $400 million, using $440,000 as the average service area, or from $260.00 to $930.00 per acre. At 5%, the Federal investment results in a savings in principal and interest of $467 million throughout the pay-off period. Averaged over the 440,000 acres of irrigated land, it would amount to $330.00 per acre if the investment is valued at 3% and $1,060.00 per acre if averaged at 5%.[111]

Landowners testified that there was no way they could conduct their farming operations in the Imperial Valley without irrigation water, and they knew of no use for their property if they did not farm it.[112] Landowner Robert C. Brown emphasized the extent to which land in the Imperial Valley was unsuitable for anything but farming. He was asked what use he could make of it if he didn't receive irrigation water:

> Well, unless there's a market for rattlesnakes and rabbits, that's about all.[113] 4 Tr. 351:15-16

So much for the victimization of the excess landowners in the Imperial Valley.

[110] *Id.*, 476:7-16.
[111] *Id.*, 476:17-478:24.
[112] *Id.*, 388:22-25; 388:6-8; 423:23-25.
[113] *Id.*, 351:15-16.

6. ADMINISTRATIVE PRACTICE.

Petitioners' recitation of the administrative practice under the Project Act is highly selective and incomplete. The relevant, longstanding practice of the Department of Interior in administering the excess land law throughout the period when the Project Act was considered by Congress and when the All American Canal contract was being negotiated and executed, is completely omitted. Doubts concerning the legal sufficiency of the practice of nonenforcement and its outright rejection in 1958 by the Solicitor General of the United States is nowhere mentioned. Con. App. 260a, 71 I.D. 554. The government's official change in the prevailing practice represented by the opinion of Solicitor Barry is barely mentioned in passing. The last mentioned legal opinions are not shown on the District's "Summary of Administrative Practice" submitted with its Appendix, Dist. App. 247a.

As pointed out earlier in the discussion of the background of the Reclamation Act, lands in private ownership within reclamation projects have long been subject to the anti-monopoly provisions of the reclamation law. Edward Weinberg, a career attorney in the Department of Interior for twenty-five years until his appointment by the President as Solicitor in 1968, had spent his entire professional career intimately associated with the reclamation laws. 2 Tr. 86:15-23. He testified that the practice in the earliest days of reclamation was to apply the acreage limitation to privately owned lands even where such lands had a "vested right" or pre-project right to the use of water from another source. So long as the project was intended to provide water service to those lands, the acreage limitation applied. *Id.*, 95:2-96:18, 105:4-106:12. This testimony was supported by a Solicitor's Opinion, approved by the First Assistant Secretary of the Department of Interior on June 14, 1927. That opinion concerned the question of the application of the acreage limitation of Section 46 to "old lands" having a partial water right and for which only a supplemental water right was to be attained by the new irrigation project. It rejected any possible distinction between "old lands" having a partial water right and for which a supplemental water right was to be made available, and "new lands", i.e., those then without any water right and for which a complete water right was to be secured from the reservoir to be constructed by the government. In relevant part, the Opinion provided:

> In a memorandum of May 12, 1927, the Acting Commissioner calls attention to the practice followed generally in relation to other projects wherein the old lands were treated as subject to the usual provisions of the reclamation act, and that any distinction which might be made in this case would be a radical departure therefrom, and would not be justified unless and until Congress clearly authorizes a different course.
>
> * * *
>
> . . . there is nothing in the legislation which expressly authorizes a departure from the practice generally followed in similar cases. The references in the act of January 12, 1927, to the lands for which only a supplemental water supply is to be furnished, leaves little room to doubt that Congress contemplated that all land of that character to which water would be supplied should become a part of this unit and it is my opinion that contracts made with the owners of such lands should require adjustments of acreage as required by the act of May 25, 1926 . . . Sol. Op. M-22401, Pl. Ex. 14, pp. 11-13; 2 Tr. 97:11-100:24.

The government also introduced the memorandum referred to in the Opinion dated May 12, 1927 prepared by Porter W. Dent, Acting Commissioner of Reclamation. Mr. Dent expressed the same views on the prevailing practice as the Solicitor in 1927 and by Mr. Weinberg at trial.

Pl. Ex. 80, 3 Tr. 164:1-20. A government survey completed on December 5, 1968 was received in evidence and its contents, along with other documents was explained in detail by Mr. Weinberg to further establish the long-standing administrative practice from 1902 to the present recognizing no distinction between "old lands" and "new lands" in the application of the anti-monopoly provisions of reclamation law. Pl. Exs. 16, 17, 18, 20, 22, 23, 24, 25, 30, 31, 35, 36, 32, 33, 20, 37, 78, 79; 2 Tr. 117:8-128:20.

With respect to the Project Act and the Imperial Valley, on November 4, 1930, Northcutt Ely, Executive Assistant to Secretary Wilbur, was asked for his opinion on whether or not the "[R]eclamation laws restrict individual holdings to 160 acres. How does this affect the District." His response was:

> The Reclamation laws' limitation of 160 acres to a particular owner represents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area. I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutary effect on suspected speculative activities in that locality. Pl.Ex. 58, Con.App. 223a, 71 I.D. 528.

The All-American Canal contract was signed by Secretary Wilbur on December 1, 1932 and by the District on January 16, 1933. LX-BC, p. 14. At that time, the 1927 Solicitor's Opinion (Pl. Ex. 14), constituting the official action and interpretation of the Department of the Interior on "vested rights", had not been revoked, and still has not been revoked. 2 Tr. 96:102:3-10.

After the All-American Canal Contract was signed by both parties, on February 4, 1933, Richard J. Coffey, District Counsel of the Bureau in Los Angeles, reported to Mr. Dent, by then the Assistant Commissioner, that Charles

Childers, attorney for the Imperial Irrigation District, had requested a Solicitor's opinion that the acreage limitation did not apply to the District, but did not want an opinion if the ruling was that the law did apply:

> Childers is very anxious to get a ruling on the point from the Solicitor, prior to the hearing of the confirmation proceedings, and the Malan suit, both of which are to be called up for hearing on March 6th next; provided, that such ruling would be that the 160-acre limitation did not apply. He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned. Con. App. 221a-222a, 71 I.D. 527.

On February 7, 1933, Mr. Dent prepared a memorandum for Northcutt Ely voicing a new opinion that the "vested water right[s]" in the Imperial Valley were entitled to recognition without regard to the acreage limitation. Con. App. 219a, 71 I.D. 525. On February 16, 1933, Mr. Ely, too, changed his mind and stated that he agreed with the 1933 views of Mr. Dent, rather than his own opinion previously expressed in 1930 and the prevailing practice of the Department of Interior. Con. App. 223a, 71 I.D. 528.

There obviously was not enough time to perform very much research or investigation before Secretary Wilbur left office. On February 24, 1933, Secretary Wilbur, without the assistance of his Solicitor, signed a letter to the District adopting the 1933 views of Mr. Dent and Mr. Ely and starting the practice of nonenforcement relied upon by petitioners. Con. App. 224a, 71 I.D. 529.

It should be noted that the Wilbur letter was not a Solicitor's opinion or formal ruling of any kind, and it did not take attorney Childers long to recognize the obvious errors in the Wilbur letter. Less than one week later, he was "apprehensive" because the Secretary did not even

refer to the most recent enactment of the acreage limitation in § 46 of the 1926 Omnibus Adjustment Act. Con. App. 228a, 71 I.D. 531. Mr. Dent then found it necessary to try to reassure Mr. Childers that Secretary Wilbur's failure to mention § 46 was not significant. *Ibid.*

Presumably, Secretary Wilbur and members of his staff would have reviewed the legislative history and devoted some time and attention to the "careful consideration" the letter said was given to the question of the 160 acre limitation before reaching the "view . . . that this limitation does not apply to land now cultivated and having a present water right." Con. App. 225a, 71 I.D. at 530. Yet the files of the Department of Interior revealed no records of any study or investigation by the Secretary or his Solicitor or staff.

Mr. Weinberg testified that prior to the preparation of the Barry opinion, the files of the Department of Interior were examined for records of negotiations bearing on the question when Secretary Wilbur gave "careful consideration" to the 160 acre question "early in the negotiations", when the decision was made, and precisely what the decision was at the time it was determined that the reclamation law did not apply to Imperial Valley. 2 Tr. 103:1-11. Searches were made of the records in the Interior Department building in Washington, D.C., the Solicitor's files, files of the Bureau of Reclamation, National Archives in Washington, federal records centers throughout the country where old Reclamation and Interior Department files were kept, files in the office of the Chief Engineer in Denver, Office of the Regional Solicitor in Los Angeles and the Regional Director at Boulder City. These searches uncovered nothing but the memorandum from Northcutt Ely of November 4, 1930, which was consistent with long-standing administrative practice but in direct conflict with

the Wilbur letter. Pl. Ex. 58, 2 Tr. 102:22-104:20; Con. App. 196a, n.25, 71 I.D. 509, n.25.

There were doubts within the Department of the Interior concerning the validity of the Wilbur letter shortly after water deliveries through the All-American Canal began in the early 1940's. Mr. Weinberg testified that ". . . it was generally common knowledge within the Bureau of Reclamation and the Department that the Chief Counsel of the Bureau of Reclamation had serious reservations about the Wilbur letter. This was the common subject of discussion. . . ." 2 Tr. 130:23-131:1.

On November 21, 1944, Secretary Ickes referred to the Wilbur letter and stated:

> "The extent of that ruling, its basis, and its governing effect are not clear." Pl.Ex. 64, 2 Tr. 133:8-134:16.

Shortly thereafter, the first occasion arose when the Wilbur letter and its substantive conclusion was actually subjected to legal analysis.[113a]

On May 31, 1945, Solicitor Harper issued his opinion, approved by Secretary Ickes, determining that Section 14 of the Project Act requires the application of the acreage limitation to the Coachella Valley. Sol.Op. M-33902, Con. App. 230a, 71 I.D. 533. Solicitor Harper considered and rejected the reasoning of the Wilbur letter. He concluded

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[113a]Landowners refer to an internal departmental document by B. P. King as an "exhaustive study" and a "definitive study" of the excess land laws in 1941 L.Br. 35, 40. This report was prepared by an associate attorney in the Billings, Montana, Field Office, was not published as a Departmental Opinion, and there is nothing of record to show that its legal analysis was ever officially sanctioned by the Department of the Interior. At the time his "report" was prepared, Mr. King had been a member of the Bar approximately 4 years. I Martindale-Hubbel Law Directory 287 (1957). Solicitor General Rankin reported to the Special Master in the *Arizona v. California* litigation that this report "is utterly devoid of logic and of any other basis for support." Con.App. 262a, 71 I.D. 555.

that it completely disregarded all other excess land provisions except Section 5 of the 1902 Act, and was contrary to the legislative history of the Project Act. Con. App. 249a-252a, 71 I.D. 546-547. Solicitor Harper appraised the Wilbur letter in these terms:

> . . . an examination of the files reveals that the letter of the former Secretary was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provision "provided, that such ruling would be that the 160-acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter, February 24, 1933, President Roosevelt was inaugurated. Con.App. 252a, 71 I.D. 547-548.

Although extremely critical of the Wilbur letter, Solicitor Harper did not specifically overrule it, but concluded that it was simply intended to apply to lands in the Imperial Valley and not those in the Coachella Valley. Con. App. 252(a), 71 I.D. 547.

From this point forward, the Department of Interior followed inconsistent administrative interpretations concerning the application of the 160-acre limitation of reclamation law under the Project Act in the Imperial and Coachella Valleys of California. The statute does not distinguish between either Valley, and, in fact, both Valleys are treated in identical fashion in the only part of the statute where they are mentioned by name. Both Valleys receive water through the All-American Canal and § 1 of the Project provides, "No charge shall be made for water or

for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; . . ." 35 Stat. 1057, 43 U.S.C. § 617. Even Porter W. Dent, upon whose expertise petitioners rely, considered the two Valleys to have indentical status under the Project Act, because the "special conditions in the Imperial and Coachella Valleys were known to Congress." Con.App 228a, 71 I.D. 532.

The next occasion when the application of the 160-acre limitation in the Imperial Valley arose was in 1958 during the proceedings before the special master appointed by this Court in the *Arizona v. California* litigation. The special master requested memoranda on the question, and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply, as reported by petitioners, was that it was no longer realistic and practicable to enforce the law simply because it had not previously been enforced. Con.App. 255a, 71 I.D. 550. But petitioners fail to mention that the Bennett view was rejected. Solicitor General Rankin, while taking the position that non-compliance with the acreage limitation was not relevant to the issues before the special master, stated his conclusion that the acreage limitation did indeed apply to privately owned lands in the Imperial Valley receiving water through the All-American Canal. Con.App. 261a-262a, 71 I.D. 555. Solicitor General Rankin stated:

> Briefly, it may be stated that for the reasons stated in Solicitor Harper's opinion as well as for others, no conclusion seems permissible, other than that the limitations of the Reclamation Law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal, are applicable in the Imperial Valley just as are the similar limitations relating to public lands open for entry within the District. . . . Clearly, the All-American

Canal is a reclamation project (36 Opp.Atty.Gen. 121, 130, 138, Dec. 26, 1920), subject to all the provisions of 'Reclamation Law,' as defined in section 12 of the Boulder Cannon Project Act . . . except as such provisions are by the Project Act made inapplicable. . . . It is at best no more logical to argue, as the California defendants have, that the omission to include in the Project Act an express limitation with respect to lands in private ownership indicates a Congressional intent that no such limitation should apply than it is to argue that the express provision was deleted because it was thought section 14 was entirely adequate to accomplish the purpose. The express limitation with respect to public lands contained in section 9 is not inconsistent with such an assumption. The express provision of section 9 with respect to the opening of public lands for entry made necessary the accompanying limitation on the size of the tracts. . . . other references to the control and effect of the provisions of Reclamation Law are to be found throughout the Project Act. In addition to Secretary Wilbur's failure to consider all of the possibly applicable provisions of the various supplements to the Reclamation Act of 1902, there are other inadequacies in his analysis for the conclusion he stated. Among them are his assumption, without analysis, that 'lands now cultivated' in the District had as against the United States vested water rights, and his assumption that those lands would receive through the works constructed by the Government only 'the continued flowage of the water covered by the right * * *'

On August 7, 1961, Senator Clinton P. Anderson, Chairman of the Senate Committee on Interior and Insular Affairs wrote to Secretary Udall and asked if the Coachella and Imperial Valleys were subject to the acreage limitation provisions of reclamation law, and, if so, the status of land ownership within them. Con.App. 263a, 71 I.D. 556.

Secretary Udall responded by stating that the "continuing press of other matters has caused us to defer a current study of the Imperial situation. We hope, however, to go into it in the future, as circumstances of available staff and time permit." Con.App. 264a-266a, 71 I.D. 556, 558. Apparently the "continuing press of other matters" prevented Secretary Udall from conducting his study until April of 1964, when the Secretary, accompanied by Mr. Weinberg, appeared before the Senate Subcommittee on Irrigation and Reclamation. The hearings were concerned with the Pacific Southwest Water Plan, a proposal to import water from outside the Colorado River Basin to make up for deficiencies in the natural flow of the Colorado. Secretary Udall and Mr. Weinberg were repeatedly pressed by Senator Anderson and particularly by Senator Kuchel of California for a definitive answer concerning the application of the acreage limitation under the Boulder Canyon Project Act. 3 Tr. 158:21-159:13; *Hearings on S. 1658* Before Subcom. on Irrig. and Reclamation of Comm. on Inter. and Insular Affairs, 88th Cong., 2d Sess., Part 2, 349-351 (1964). It was then decided that the time to conduct a definitive study of the question at issue in this case had arrived. This process was explained by Mr. Weinberg:

> The senators who were doing the interrogating, indicated they felt it was a very important matter, that Congress was entitled to know the answer. The Secretary, the Solicitor, and I, thereupon conferred and we concluded that this skeleton could no longer rattle around in the closet. The time had come when we had to take it out, fairly examine it, and set the matter to rest, one way or another, in fairness to Imperial. If a full examination revealed that the excess land laws, in our judgment, were not applicable, Imperial, we thought, felt as entitled to such a determination. On the other hand, if that were not the situation, it was our conclusion that the matter should be brought into

the open, laid on the table, and disposed of. 3 Tr. 159:1-13.

On December 31, 1964, Solicitor Barry issued a formal opinion after eight months of research and preparation. Sol.Op. M-36675, Con.App. 182a, 71 I.D. 496; 3 Tr. 210: 3-22. It concluded:

> The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been said by Congress as its plain intent.
>
> The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress.
>
> The fact that the Department has failed for over 30 years to enforce the excess land laws acreage limitations in Imperial Valley cannot legitimize a violation of public policy contrary to the spirit and the letter of the law.
>
> I have concluded, after a consideration of all issues, that . . . : Privately owned land in Imperial Irrigation District, even those assumed to have vested Colorado River water rights, are subject to the excess land laws. Con.App. 210a, 71 I.D. 518-19.[113b]

[113b]The landowners point to a challenge to the "legal sufficiency" of the Barry Opinion by Undersecretary Carver. L.Br. 17, n.17, LX-CQ. However, the uncontradicted evidence at trial was that Mr. Carver was not involved in reclamation law matters in the Department, his memorandum was actually drafted by an assistant, and, more importantly, Secretary Udall "was not impressed" with the views expressed in the memorandum, Solicitor Weinberg considered that Mr. Carver had made a "grievous error of law" in his reading of Section 46. 3 Tr. 202:1-3, 206:22-25, 207:15-17 and 251:19, 252:4.

The record shows that Wilbur letter was presented to the Secretary for signature less than ten days before he left office. In the district court, the government commented,

> The Wilbur letter must be considered for what it was, a partisan effort by a lame-duck administration to effect, by administrative interpretation, an exemption that proponents of the Project Act never dared risk seeking directly. 3 CR 148.

Only one of the personalities involved in bringing about the issuance of the Wilbur letter remains. Despite the grave charges hurled against Secretary Wilbur and his colleagues by Solicitor Harper in 1945 and by the government in this case, neither the District nor the landowners called Northcutt Ely, Secretary Wilbur's Executive Assistant, to testify and explain away the documents in the record relating to the circumstances surrounding issuance of the Wilbur letter. Since Mr. Ely negotiated the All-American Canal contract in behalf of the government (his signature appears on the contract beneath that of Secretary Wilbur, Dist. App. 212a) and thereafter became counsel to the District in this very case, respondents assume that he was available to testify by deposition or in person during the four years this case was pending in the district court. His failure to testify is a crucial factor for consideration by this Court.

The court of appeals considered the Barry Opinion to be "thorough and comprehensive" while rejecting the informal Wilbur letter's rather simplistic analysis not contained in a formal opinion." 559 F.2d at 539. The Court noted that the letter concerned itself with the sale of water-rights under § 5 of the 1902 Act, and did not purport to consider § 46 of the Omnibus Adjustment Act, which

does not speak in terms of the sale of water. Of major significance was the court's observation that the letter failed to mention most of the petitioners' contentions in this case and only considered a variation of the "present perfected rights" argument in its discussion of "vested rights."[113c]

After reviewing the practice summarized above by respondents, the Ninth Circuit declined to accord deference to "an informal opinion reached under circumstances indicating a lack of careful consideration, whose conclusions have not been consistently held to be correct by the Department of the Interior" and the Wilbur letter "does not construe ambiguous or doubtful language in the Project Act, but is a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes, consequently never before Congress when the Project Act was being considered". *Id.* at 539. The inaction of the Department of the Interior based on previous inaction was not considered sufficient to be elevated into an administrative determination to which the courts should defer. *Id.* at 559. Any consideration to adherence to the Wilbur letter because its existence was brought to the attention of Congress was rejected because, for the most part, the subject to the Imperial Valley was never the focus of the congressional consideration. *Id.* at 540-41.

[113c]The term "present perfected rights" appears in Article VIII of the Colorado River Compact and § 6 of the Project Act, 45 Stat. 1061; 43 U.S.C. § 617e. Presumably, the relevant provisions of the Project Act would have been well known to Messrs. Wilbur, Dent and Ely, even though they apparently overlooked the existence of § 46.

7. THE PARTIES.

A. Landowner—Petitioners.

Landowner-petitioners John M. Bryant, et al. (hereafter "landowners") are class intervenors essentially composed of 150 partnerships and corporations who conduct most of the farming operations of more than 160 acres in the Imperial Valley.[114] As the owners of "some of the finest agricultural land in the world,'[115] they enjoy a year round, dependable supply of irrigation water from the Colorado River provided to them at no cost, for under § 1 of the Project Act, there is no charge for the use, storage or delivery of water for irrigation purposes in the Imperial and Coachella Valleys. 45 Stat. 1057; 43 U.S.C. § 617. The landowners have paid no part of the costs of constructing the All-American Canal because all repayment costs have been made from revenues derived by Imperial Irrigation District from the sale of electrical power generated by hydro-electrical facilities on the Canal. 322 F.Supp. at 14. Power revenues will be sufficient to pay the balance of the District's obligations. 4 Tr. 477:17-20.

As described *infra*, the Reclamation Act was specifically designed to create and maintain family *sized* farms with the federal water subsidy. Landowners' description of themselves as family farmers of the yeoman class finds support only in the mythical account in their brief. The reality presents a far different picture.

[114]322 F.Supp. at 12. The parties stipulated at trial that about 800 "persons" owned approximately 233,000 excess acres as of September 3, 1965. The figures in the text are more recent and specific and are derived from *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis*, Staff Report by the Economics, Statistics, and Cooperative Service, U.S. Dept. of Agriculture, No. ECCS-04, p. 17 (1978).

[115]595 F.2d at 528.

Landowners tell this Court that they "represent the people whose lives are threatened with harsh dislocation and devastating economic loss by the decision below". L.Br. 18. They go on to describe themselves and each member of the class they represent as an owner of "farmland on which he has invested the better part of his life's labor and the bulk of his life's savings. *Typically*, they have acquired their lands over a period of one or two decades, paying market prices which reflected whatever economic value accrued to the land from project benefits". *Ibid.* (emphasis added).

Let us take one "typical" example, landowner Stephen Elmore. Instead of being a "typical" example of the family farmer sought to be portrayed, this illustration demonstrates the extent of the total distortion of the facts and the record in the briefs of petitioners. The "thumbnail sketch" in the landowner's brief simply tells the Court that Mr. Elmore and his wife "jointly own 2,208 acres which they farm. Elmore grew up in the Valley, the son of a homesteader who began farming in the Valley in 1908. The lands owned by Elmore and his wife were acquired by them during the period 1951-1964". L.Bd. 18, n. 18. The record presents another story. Mr. Elmore acknowledged personally farming "a little over 4,200 acres. Gross acreage of a little over 4,600 acres" and owning "slightly over 2,200". 3 Tr. 354:15-19. He made two purchases of farmland in 1951, 320 acres at $46.00 per acre and 315 acres at $241.00. *Id.*, 357:13-20, 358:9-15. In 1952, he purchased 272 acres at $297.00 each. *Id.*, 358:19-359:3. In 1960 he purchased 352 acres at $952.00 and in 1964 he purchased 628 acres at $437.00 per acre. *Id.*, 359:8-22. Other sources

show that the Elmore family farms from 10,000[116] to 14,000[117] acres.[118]

The Elmore case may indeed be representative of the excess landowners in the Imperial Valley, but not in the fashion they intended to represent. The latest figures available to the U.S. Department of Agriculture are for the year 1974. They show that at that time, there were 715 farming operations in the Imperial Irrigation District averaging 716 acres per farm. Farm numbers and sizes were distributed as follows:

Land in farms	Number of Farms
Less than 50 acres	194
50 to 179 acres	141
180 to 499 acres	139
500 to 999 acres	91
1,000 to 1,999 acres	73
2,000 acres and over	77

121,892 acres were farmed by corporate owners, with an average of 1,463 acres each. Farms of all types of ownership were distributed by type of business organization as follows:

Type of Business	Number	Average Size
Sole proprietorships	505	490 acres
Partnerships	120	1,175 acres
Corporations	84	1,463 acres
Others	6	113 acres

[116] *Will the Family Farm Survive in America?* Joint Hearings Before Senate Select Comm. on Small Business and Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., Part 1A, 597 (1975).

[117] *Id.* at 601.

[118] The status of landowner John Kubler is also erroneously represented. Mr. Kubler is not a person who "now farms . . . on 680 acres owned by him." L.Br. 19. He testified that he owns 860 acres and farms an additional 1600 in "diversified farming operation . . . we grow various crops. We're not limited to field crops or just one commodity. We grow field crops, virtually all of the field crops grown in the Valley. We grow produce. We also are in the cattle business, growing pasture and owning cattle . . . averaging 3,000 head." 4 Tr. 371:10-372:3. He has 12 permanent employees, seven of whom live "on the range." *Id.*, 372:20-25.

The Department of Agriculture concluded:

> "The U.S. Department of the Interior has estimated 265,000 acres (60 percent of the irrigated acreage) in the District are excess land. It seems likely that much of the excess land is farmed by the 150 farming operations that exceed 1,000 acres in 1974 and is probably owned by the 204 partnerships and corporations shown above."[119]

A high percentage of large landholdings in the reclamation program is unique to California. For example, in the North Platte Project in Nebraska, it was reported that more than half of the ownerships were in excess by 50 acres or less and only five owners were in excess by more than 250 acres.[119a] In the Columbia Basin Project in 1973, about 97 per cent of the farms were 640 acres or less, although 3 per cent of the irrigated land was in farms averaging more than 1,000 acres, accounting for 13 per cent of the irrigated land.[119b]

Mr. Elmore acknowledged, as do all landowners in the Imperial Valley, that he could not farm his land without irrigation water from the project, for there is an average annual rainfall of less than 2 inches. 3 Tr. 363:20-23. Landowners made no effort to develop a record concerning the quality of Mr. Elmore's land and its condition at the time he purchased it. Nevertheless, it is safe to assume that his lands, like others in the Valley, are capable of high agricultural production only because of the federal water subsidy, for there is no other source of water. In addition to what must certainly be a substantial income from his agricultural production, Mr. Elmore receives

[119] *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis,* Staff Report by the Economics, Statistics, and Cooperatives Service, U.S. Dept. of Agriculture, No. ECCS-04, p. 17 (1978).

[119a] *Id.* at 37.

[119b] *Id.* at 43.

other subsidies from other government programs as a further direct result of the water subsidy. In 1971, for example, he received a $102,922 in payments from the government under the Agricultural Act of 1970.[120]

Although reporting that Mr. Elmore was the son of a "homesteader who began farming in the Valley in 1908", the record does not show how his attorney-father acquired his land after coming to the Valley. L.Br. 18, n.18; 3 Tr. 356:14-25. However, the District tells us:

> All of the lands in the decreed area of 424,145 acres in Imperial Valley were acquired from the United States prior to or soon after the turn of the century, by entry under the Desert Land Act, 43 U.S.C. §§ 321, *et. seq.*, or other homestead laws. 43 U.S.C. §§161 *et. seq.* All of these laws require the applicant to have lived on these desert lands for a specified period of years. The Desert Land Act required proof of acquisition of a water right under state law by bona fide prior appropriations. . . Dist. Br. 10, n.10.

Respondents do not dispute that most of the present land holdings in the Imperial Valley apparently evolved from Desert Land Act entries. Nevertheless, the implication of the District that somehow all persons acquiring land under the discredited Desert Land Act were legitimate, bona fide homesteaders is contrary to the historic facts. Professor Sax succinctly described the abuses under this Act in these terms:

> However misguided the Homestead Act was from the point of view of developing an independent western yeomanry, its provisions seem only mildly imprudent by comparison with other congressional schemes for disposing of the public domain. The Desert Land Act of 1877 permitted one, upon a small payment, to

[120] 118 Cong. Rec. E. 2230 (daily ed. March 9, 1972). The other nominal landowner parties also received substantial payments under the same program during 1971. Mr. Bryant received $57,477, Mr. Singh $30,838 and Mr. Brown $37,767. *Ibid.*

acquire up to 640 acres of arid land, provided he would irrigate it—a virtual impossibility; the Act was openly violated by the use of professional witnesses who would testify for a fee that they had "seen water upon the claim," meaning that a bucket had been emptied upon the ground in their presence. The law thus encouraged huge holding by large sheep and cattle companies. Sax, *Federal Reclamation Law,* 2 Waters and Water Rights § 110.1, p. 115 (1967)

The historian Paul W. Gates, writing for the Public Land Law Review Commission, reported that "[T]he ink was hardly dry on the Desert Land Act before complaints reached the Land Office that there were loopholes in the act that Congress should close by explanatory and more carefully drawn restrictions. One story was told about a man who hauled a can of water to his claim, poured it into a furrow, and then swore, and his friends supported him, that he had conducted water on his claim. Another person, to gain control of the lands near a stream filed an application for land in zig-zag shape with 44 corners." Gates, *History of Public Land Law Development* 639 (1968).

The trial testimony of a few individual landowners, apparently some of the few excess owners who actually live in the Imperial Valley on the land irrigated with the water subsidy, can hardly be considered "typical" and was not considered to be representative by the district court. Petitioners carefully avoided making a complete record of the development of ownership patterns. The Department of Agriculture's figures show the present extent of large scale ownership and operation of subsidized agriculture in the Imperial Valley. In addition to large scale ownership, between 45 and 50% of the irrigated farms in the District are owned by non-residents, individuals and corporations. *Yellen v. Hickel,* 352 F.Supp. 1300, 1317 (S.D.

Cal. 1971), *vacated on other grounds,* 559 F.2d 509 (9th Cir. 1977).

Large scale, absentee ownership has long characterized the Valley. In 1905, it was reported that "the lands [in the Imperial Valley] for the most part have now passed into the hands of individuals in relatively large tracts—upwards of 320 acres or even more, and many of the owners do not live in the valley. . ." 33 L.D. 391, 401. During the period 1920 to 1928, between 35 and 50% of the District's farms were owned by non-residents. *Yellen v. Hickel, supra,* 352 F.Supp. at 1317. By the late 20's, privately developed irrigation produced the effects in the Imperial Valley that Congress had anticipated and sought to avoid in the Reclamation Act. Although about a third of the population was composed almost entirely of field laborers, control of production of two principal crops—melons and lettuce—already was concentrated in the hands of 56 and 67 growers, respectively, with average acreages of 667 and 336. Taylor, *Water, Land, and Environment, Imperial Valley: Law Caught In The Winds of Politics,* 13 Natural Resources J. 1, 4 1973). By 1936, corporations owned 23% of the 430,000 acres under cultivation: about 43% of the farm land was owned by slightly less than 6% of the owners who held more than 439 acres and averaged 1200 acres each; 46% of the farmland was operated in units of 440 acres or larger, was controlled by less than 8% of the total number of farm operators and averaged about 930 acres. At the same time, about 40% of the landowners did not live in the Valley but collectively controlled 48% of the total farm acreage. *Land Ownership and Operating Tenure in Imperial Valley, California,* 1-2 (U.S. Dept. of Agriculture, March, 1942, Berkeley, Cal.)

Neither the district judge in the present case nor the district judge in the residency case made any finding as to the manner in which ownership patterns developed from

the turn of the century down through the years. The "typical" circumstances summarized by landowners are deceptive and find no support in either history or the record. Barely a handful of individual landowners testified at trial. No explanation was offered about how the better known of present day landowners such as the Irvine Co., Holly Sugar Co. and Inter Harvest, Inc.[121] fit in with landowners' "typical" settlement pattern.

B. Petitioner Imperial Irrigation District.

The Imperial Irrigation District was the original defendant in the district court. The District is a unit of state government organized to deal with water distribution (*Salyear Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 721-23 [1973]), and the conduit for the federal water subsidy between the federal government and the landowners. Instead of being neutral among the conflicting interests in the Imperial Valley, the District apparently views its role as that of an advocate for the approximately 150 farming operations in whose behalf this proceeding has been pursued.[122]

C. Petitioner State of California.

The State of California intervened as a defendant in the district court. However, all parties agreed that the reclamation law had no application to lands owned by the State in the Imperial Water Fowl Management Area, thus granting California all the relief it requested. 332 F.Supp. at 11; 595 F.2d at 524. California thus no longer has a direct interest in the subject matter of this controversy and its continued presence in the case is curious. Morever, its brief merely restates the arguments of the other petitioners on administrative practice. Accordingly, respondents shall make no direct response to California's brief.

[121] 118 Cong. Rec. E 2231 (daily ed. March 9, 1972).

[122] In his summation at trial, counsel for the District stated, ". . . the contract does not contain the excess land limitation travesty." 5 Tr. 599:19.

D. Respondents.

Respondents are 123 residents of the Imperial Valley who do not own farmland in the Valley or anywhere else. They consist of a physician, a farm labor contractor and 121 agricultural workers. Each wants to purchase the "excess lands" which must be sold at below market prices under the recordable contract mandated by § 46 so that they may engage in farming with the water subsidy.

8. PROCEEDINGS IN THE DISTRICT COURT AND RESPONDENT'S INTERVENTION.

The respondents filed their motion to intervene for purposes of appealing the final judgment a few weeks prior to the expiration of time for the government to file its Notice of Appeal. 2 CR 47, Con.App. 320a. Respondents consist of 123 persons who reside in the Imperial Valley and alleged that most of them are agricultural workers who do not own farm land anywhere in the United States, but wish to purchase the excess lands being irrigated with Colorado River water delivered to the Imperial Valley through the All-American Canal. One of the respondents, Ben Yellen, a physician, stated in his Affidavit that he was personally acquainted with all of the respondents, most of them have been employed as agricultural workers within the District, none of the respondents own farm land anywhere in the United States, and all of them wish to own land to engage in farming. In addition, he stated that land in the Valley without water has a market value and sells for approximately $25.00 to $50.00 per acre, while land irrigated with Colorado River water delivered through the All-American Canal has a value and sells for between $1,200.00 and $1,400.00 per acre, and that respondents are unable to purchase irrigated lands unless the

government appealed the adverse judgment of the district court and ultimately prevailed so that the excess lands would be sold under conditions established by the Secretary of the Interior. 1 CR 169, Con.App. 323a.

At the time respondents sought intervention, they were parties to another case pending in the district court where they sought to compel the Secretary of the Interior to enforce the residency requirement of § 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431 and alleged that the finality of the acreage case would preclude them from proceeding in the residency case. Section 5 reads:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred sixty acres to any one landowner and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

Respondents alleged in the residency case that approximately 70% of the privately owned land being irrigated in the District was owned by persons who were neither bona fide residents on such land, nor occupants thereof residing in the neighborhood of the land, as expressly prohibited by § 5. By reason of the failure of the Secretary to require compliance with the residency requirement and by providing irrigation water to lands owned by non-residents, water was being supplied for ownerships which were investment interests in farms rather than working interests, irrigated farms were being leased by non-resident owners, there was land speculation, and the cost of land had risen to unreasonably high prices so that there was no land available to purchase and homestead within the District. 1 CR 204, 209-10. Respondents' complaint was before the district court in the present case at the time

of the intervention motion and is part of the record on appeal. At the hearing on respondents' intervention motion, the attorney requested the clerk to bring the file from the companion residency case and requested the court to take judicial notice of the contents of that file. Tr. March 29, 1971, 12:21-13:2. Counsel for the District stated that he had read the file of the residency case prior to the hearing. *Id.*, 13:24-14-1.

Ultimately, partial summary judgment and final judgment were entered in favor of respondents. 235 F.Supp. 200 (S.D.Cal. 1971), 352 F. Supp. 1300 (S.D.Cal. 1972). The court of appeals reversed the final judgment because of respondents' lack of standing, without voicing an opinion on the merits. 559 F.2d 509 (9th Cir. 1977). In view of the decision of the Secretary to enforce the residency requirement, announced 4 days after the Ninth Circuit's opinion was filed, respondents did not petition for re-hearing or seek review in this Court. 43 C.F.R. § 426, Dist.App. 217a. A formal Solicitor's Opinion upholding the residencey requirement was filed December 6, 1979. Sol.Op.M-36919.

The challenge in this Court to respondents' status questions their "appealable interest" and is a "standing to sue" argument. When respondents attempted to enter the case after judgment in the district court, they did not file a complaint but simply filed affidavits in support of their motion to intervene. No affidavits were filed in opposition by the government, the landowners or the District. If respondents had filed a complaint and petitioners had moved to dismiss for lack of standing, all material allegations of the complaint would be deemed to be true. *E.g., Warth v. Seldin,* 422 U.S. 490, 501 (1975). The trial court has the power to allow or require a plaintiff to provide "further particularized allegations of fact deemed supportive of plaintiff's standing." *Ibid.* Leave to amend, at least once, would have been granted in an important case

such as the case at bench. *Dowdy v. Procter & Gamble Manufacturing Company,* 267 F.2d 827, 828 (9th Cir. 1959).[123]

Along with eleven affidavits from among their number, respondents filed an affidavit of former Solicitor Barry. Solicitor Barry voiced his opinion that the present case involved important considerations of national policy and that the final judgment of the District Court should be appealed so that these important considerations of national policy could be finally resolved by the appellate courts. 1 CT 161, Con.App. 346a.

Respondents' documentation also included a copy of a newspaper article from the February 25, 1971 edition of the *Sacramento Bee,* where it was reported that the Interior and Justice Departments each denied that it would make the decision as to whether or not the government would appeal the judgment. Each department claimed it would only make a "recommendation" and asserted that the other would make the decision. 2 CR 60, Con.App. 349a.

The government filed no documents in opposition to the application for intervention. At the hearing on the Intervention motion on March 29, 1971 (the time to appeal expired April 9, 1971), the Assistant United States Attor-

[123]Plaintiffs must be provided an opportunity to be heard before their action is dismissed. *Harmon v. Superior Court,* 307 F.2d 796 (9th Cir. 1962); *Potter v. McCall,* 433 F.2d 1087, 1088-89 (9th Cir. 1970); *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 280-281 (9th Cir. 1974). If a motion to dismiss on the standing issue is granted, the court is required to advise the plaintiffs of the reason for the dismissal so that they could make an intelligent choice as to amending. *Bonanno v. Thomas,* 309 F.2d 320, 322 (9th Cir. 1962). Leave to amend is to be freely given if it appears at all possible that a plaintiff can correct the defect. Rule 15, Fed.R.Civ.P. Respondents were not provided an opportunity to supplement or improve upon their affidavits. However, in view of the unusual posture of this case, respondents suggest that all possible favorable inferences be drawn from the affidavits so that the Court may reach a final resolution of this dispute.

ney was unable or unwilling to state whether or not the government intended to appeal. After advising the Court that he had recently been in contact with the Chief of the Litigation Section of the Land and Natural Resources Division of the Justice Department, the counsel for the government stated:

> I have been told that the decision (whether or not to appeal) has not yet been made; and when it is made, the Court and all parties would be appropriately notified, and promptly; that it would be improper to infer from, based on newspaper articles or other kinds of speculation, that the government would not take an appeal. Tr. March 29, 1971, 22:2-7.

As matters turned out, only eleven days later, the "speculation" from the newspaper articles proved to be correct and the government did not appeal from a case which had been in litigation in the trial court for a period of four years and involved the vast benefits received from the expenditure of millions of dollars of public funds on one of our major reclamation projects.

At the conclusion of the hearing, the district court made an order denying respondents' motion to intervene. 1 CR 165, Con.App. 352a. Although finding the application to intervene to be timely and without prejudice to the existing parties, intervention was denied on the grounds that respondents were barred by the doctrine of *res judicata* because of the confirmation proceedings in the *Hewes* case, respondents did not have sufficient interest to warrant intervention and their interests, if any, were being adequately represented by the government. Respondents then filed a protective notice of appeal. 2 CR 45.

A panel of the Ninth Circuit reversed the order denying intervention and validated the protective notice of appeal. 559 F.2d 543. The only reason given by the panel was the decisional conflict between the judgment of the

district court in the acreage case and the judgment entered by a different judge in the residency case:

> . . . because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting decisions on legal issues of public and private importance should be enforced in this circuit. *Ibid.*

The conflict arose because the District Judge in the residency case concluded that § 14 of the Project Act incorporated the anti-monopoly of reclamation law, while the District Judge in the acreage case held to the contrary.

The appeal on the merits came before a different panel. In view of its disposition of the residency case, the court chose to reexamine the earlier order allowing intervention, rather than adhering to the "law of the case" doctrine. 559 F.2d at 520.

The Ninth Circuit acknowledged that a party need not possess the standing necessary to institute a law suit in order to intervene pursuant to Rule 24, Fed. R. Civ. P., 559 F.2d at 521. *Trbovich v. United Mine Workers of America,* 404 U.S. 528 (1972). Nevertheless, the court held that a party having the requisite interest to intervene does not automatically have the ability to appeal a decision which the other parties have decided not to appeal. In order to determine if respondents had an "appealable interest", the court applied a "standing to sue" test. 559 F.2d 521.

The Ninth Circuit concluded that respondents had an interest under Rule 24(a)(2) to pursue the appeal. In reaching this conclusion, the court considered three factors:

(1) It looked to one of the primary purposes of the Reclamation Act, the establishment of a large number of family size farms (559 F.2d at 521-522);

(2) It found respondents were injured by reason of the fact that they would have to pay prices for excess lands which would be higher than they would have to pay if § 46 applied to private landowners in the Imperial Valley (*Id.* at 522); and

(3) It concluded that respondents, as non-landowning residents of an area where agriculture is feasible only because of a federal irrigation project who desire to purchase agricultural land and become farmers, are particular "beneficiaries" of § 46 and thus possess an interest sufficiently within the "zone of interests" protected by § 46 (*Id.* at 523).

The panel's determination of respondents' standing is completely consistent with the Secretary's present scheme to enforce the sale of excess land under recordable contracts. Dist. App. 217a, 43 C.F.R. § 426. As eligible nonexcess owners, respondents would be in a position to obtain some of the excess lands at below market prices. Project water may be delivered to excess land only on condition that the excess landowner "executes a valid recordable contract for the sale of that land to a nonexcess owner". 43 C.F.R. § 426.5a (1).

The purchaser is to be selected by the Secretary under a plan designed to discourage fraudulent, bogus and other means designed to circumvent the policy of the law.

> . . . the Secretary shall publish widely the notice of availability of such land, which describes the land and its possible uses, and which includes the expiration date of the recordable contract. (2) All prospective eligible nonexcess owners interested in purchasing a particular parcel shall file with the Regional Director (of the Bureau of Reclamation) a formal expression of interest which will describe their financial and other capacity to own and farm the land. (3) When the owner of the particular parcel under recordable contract desires to sell the land, or when

> power of attorney vests in the Secretary under the recordable contract, the Bureau shall select, by lottery, or other impartial means from those expressing an interest, a purchaser of the land at the approved price. § 426.10(b).

A prospective purchaser shall have ninety days to obtain financing and this period may be extended upon good cause. § 426.10(b)(4).

The court of appeals reversed the order denying intervention on all grounds. 559 F.2d at 523, n. 23. Petitioners challenge only the court's conclusion that respondents possess an appealable interest.

9. THE GOVERNMENT'S DECISION NOT TO APPEAL.

Apparently unwilling to have the issues in this case decided on their substantive merits alone, petitioners have made a blatant attempt to prejudice this Court by announcing that the government did not appeal the judgment of the district court because Solicitor General Griswold "determined that the judgment of the trial court was correct and should not be appealed" and that he "became convinced (a) we would not win the case in the court of appeals and (b) we should not win it". L.Br. 3, 17, Dist.Br. 5. Petitioners make no reference to the trial record but to material in the Congressional Record where Solicitor General Griswold defended his decision not to appeal. To date, neither the government nor Solicitor General Griswold has ever provided a public explanation for the decision. In view of the repeated efforts of petitioners to bring this matter to the attention of the Court, respondents are compelled to make a full response and place the matter in context.

Solicitor General Griswold was obviously wrong in his prediction about the outcome of the appeal in the court of appeals. More importantly (and respondents present this discussion only with the greatest reluctance), reference to

other available material raises grave questions about the motive for the decision.

After the district court's opinion was filed, landowner-petitioner Stephen H. Elmore, who farms 14,000 acres in the Imperial Valley with his family and was a neighbor of then President Nixon in San Clemente, went to Washington with his attorneys and met with Justice Department officials when an appeal was under consideration. *Will the Family Farm Survive in America?* Joint Hearings Before Senate Select Comm. on Small Business and Comm. on Interior and Insular Affairs, 94th Cong. 1st Sess., Part 1A 601-02 (1975). At the same time, Senator Clinton P. Anderson, Chairman of the Senate Sub-Committee on Water and Power Resources, wrote to Attorney General Mitchell and pointed out that the district court's decision undermined policy on reclamation projects throughout the West:

> . . . nearly all Federal reclamation projects for many years have been authorized by statutes employing language similar to that used in the Boulder Canyon Project Act, which the District Court held did not incorporate the excess-land limitations by reference . . .
>
> . . . it has never been questioned that the language in these authorizing acts which is substantially identical to section 14 of the Boulder Canyon Project Act, makes the excess-land limitations of the federal reclamation laws applicable. The District Court's opinion now, for the first time, raises a substantial question regarding whether the Department of the Interior, the Congress and the water user groups seeking project authorizations have been in error in assuming that authorizing a Project subject to the Federal reclamation laws makes excess-land limitations applicable. *Will The Family Farm Survive in America?, supra* at 565.

Senator Anderson voiced concern that the district court's opinion would apply to the Central Arizona Project and

upper basin projects authorized in the Colorado River Basin Project Act of 1968 (P.L. 90-537), the Colorado River Storage Project Act of 1956, and the Central Valley Project in California. He expressed these fears to Interior Solicitor Melich:

> A second area of uncertainty introduced by the opinion deals with the relationship between excess-land limitations and pre-project use of water. These uncertainties are westwide in their implications . . . Certainly, any suggestion that supplemental water projects should be exempt from the excess land laws by Congress would engender great controversy. When such an attempt was made back in the middle '40's involving principally the Central Valley Project, it was rejected by the Congress, but the turmoil that ensued plagued the reclamation program for many years. A lower court holding that can be read as possibly having such an effect can be expected to give rise to extensive controversy in connection with future authorizations which could have a substantial adverse impact upon the reclamation program . . . .
>
> As for the merits of the legal question, there is substantial doubt concerning the legal validity of the Court's holding as demonstrated by the fact that the Solicitor General of the United States in the Eisenhower administration felt it necessary to state the Supreme Court's Special Master hearing Arizona v. California that, in his opinion, excess-land limitations are fully applicable. *Will The Family Farm Survive in America?, supra* at 566-67.

Despite the urging of Senator Anderson, Deputy Attorney General Kleindienst, Secretary Morton and Solicitor Melich recommended against taking an appeal. The record does not show the reasons, if any, for this recommendation. Assistant Attorney General Shiro Kashiwa of the Lands Division and three members of the Solicitor General's staff recommended that the appeal be taken. 126 Cong.Rec. S1632 (daily ed. Feb. 20, 1980).

Reference to the material cited by petitioners from the Congressional Record discloses that Solicitor General Griswold was compelled to provide a private explanation—no public explanation has ever been given—because of a critical letter he received from a private citizen in Manhattan, Kansas who read about his decision not to appeal in a magazine.

> . . . The report of your part in the decision not to appeal makes you appear to be a man of little integrity. If you can explain how a man with respect for the law of the land, as passed by Congress and validated by the President's signature can countenance such action, or lack of it, I would appreciate hearing it.
>
> The whole action smells of rot at the core of our government and makes me wonder whether the long-haired kids who talk of getting rid of it may not have some validity to their thinking.
>
> Yours with dwindling respect,
> Mrs. Stephen L. Stover

Will the Family Farm Survive in America? supra at 571.

It is significant that Solicitor General Griswold's letter and its erroneous conclusion evoked responses from Professor Joseph L. Sax, author of the leading text on the Reclamation Act:

> September 1, 1971.
>
> Hon. Erwin N. Griswold,
> Solicitor General of the United States, U.S. Department of Justice, Washington, D.C.
>
> Dear General Griswold:
>
> Someone sent me a copy of a letter that went out under your signature, dated June 1, 1971, to Mrs. Stephen L. Stover of Manhattan, Kansas. The letter inquired about the position of the Justice Department in the excess land case involving the Imperial Valley in California.

As one who has written about the Reclamation law, I was surprised to see in your letter the following:

"... There is a provision in the reclamation laws which provide that when land is reclaimed through a federal project, land holdings cannot exceed 160 acres . . . no land was reclaimed by the construction of the All-American Canal."

Occasionally one recalls the warnings he received in law school, among them the danger in paraphrasing statutory language. My recollection is that the excess land provision of the Reclamation Law, 43 U.S.C. Section 431, says:

"No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one land owner."

I recall no general provision in the law that limits the excess land law to land "reclaimed through a federal project," and if you examine the legislative history of the statute, you will recall that Representative Newlands, the sponsor of the Act, took no such view. 36 Cong.Rec. 6734 (1902). Of course a great many reclamation projects involve the supply of supplementary water to land already in cultivation. To the best of my knowledge it has never been thought that this fact exempted the project from the provision of the excess land law.

I recognize that the Imperial Valley case was a complex one; but I think Mrs. Stover was entitled to a more accurate explanation.

Very truly yours,
Joseph L. Sax,
Professor of Law.

September 21, 1971.

ERWIN N. GRISWOLD,
Solicitor General, Office of the Solicitor General, Washington, D.C.

DEAR GENERAL GRISWOLD: I appreciate very much that you took the time to reply to my letter of September 1, commenting on the Imperial Irrigation District case.

I know it would be an imposition to engage you in further correspondence, but I hope you will permit me to make an observation or two about the future.

As you know, for many years the excess land law was little enforced, and the residency requirement of the reclamation law has been wholly ignored. Those concerned about reclamation law were therefore understandably pleased when the Interior and Justice Departments decided to go forward with the IID case. I recognize the complexity of the issues there, but I hope that the Department of Justice will make a concerted effort to enforce the excess land law.

Though bills are annually introduced in Congress calling for repeal of the excess land provisions as an anachronism, this is certainly not the case. A great many agricultural workers, particularly in California, would welcome the opportunity to become farm owners, if only that opportunity to acquire fertile farm lands were made under reasonable circumstances. Indeed it is my own view, that many of the current farm labor problems would be best resolved by encouraging the creation of an owner class among family farmers.

At the present time non-enforcement or limited enforcement of the excess land and residential laws stand as an obstacle to this development. Once the laws are enforced, of course, steps will have to be taken to assure credit for the purchase of farm lands so the job is a complex and extended one; but enforcement of the law is a needed first step.

It may seem romantic today to suggest that the very motive that lay behind enactment of the reclamation law in 1902 is still a sensible policy today; but I am sure that as you look into the question, you will find many very well informed people who think that this is precisely the case.

It is often said that the excess land law cannot work because small farms are uneconomic. Even to the ex-

tent that this is true, which does not speak to the problem of ownership, but only to management practices, if it is economically necessary to operate and market farm products on a large scale, it is perfectly possible to do this by cooperative arrangements among a number of owners of modest sized family farms.

I make these comments only because it is so widely believed in Washington that no significant public policy could be advanced by vigorous enforcement of the reclamation law. Perhaps this view affected your own judgment about the IID case. If so, I hope you will explore the question further as opportunities arise.

Cordially yours,

JOSEPH L. SAX,
Professor of Law.

P.S.—I am very glad to follow your suggestion about distribution of the letter you sent me on September 16. I am, however, sending copies of this letter to several interested parties.

Will the Family Farm Survive in America, supra at 588-89.

When Solicitor General Griswold made his decision not to appeal, he felt it necessary to prepare a Memorandum for the Files. 126 Cong.Rec. S1632 (daily ed. Feb. 20, 1980). Significantly, he did not take the opportunity to either analyze or defend the substance of the Wilbur letter. The reasons given by Solicitor General Griswold were ultimately rejected by the court of appeals.

SUMMARY OF ARGUMENT

This is a case where 150 farming operations of 1,000 acres or more think they have a vested right to the Colorado River in perpetuity. Although they have paid nothing for constructing the high dam at Black Canyon, nothing for the storage facilities in Lake Mead, and nothing for the costs of constructing the All-American Canal, they have the temerity to tell this Court that they should be allowed to retain the water subsidy intended for others because it would be "blatantly unfair" to require them to obey the law. L.Br. 24. The arguments of petitioners have an "Alice in Wonderland" ring to them. Where else, but in petitioners' fantasyland, would a handful of businessmen who have received hundreds of millions of dollars worth of the West's liquid gold for 40 years contrary to the law of the land, have the effrontery to tell this Court that they should be allowed to continue receiving it because of "fairness"? And where else, one might ask, would a public agency like the Imperial Irrigation District misrepresent the source of repayment of $12.5 million in construction costs of the All-American Canal and accuse those persons whom Congress clearly intended to receive the water subsidy with "ripping off" those who have benefited by an erroneous administrative decision totally lacking in substantive merit? Dist. Br. 73.

It is unfortunate that the District has found it necessary to resort to the language of the street, rather than the language of the courtroom. But none of the wild charges hurled about by petitioners can obscure the fact that their success in this case would not serve national reclamation policy and would continue to frustrate that policy as it has been frustrated the past 40 years in the Imperial Valley. Notably absent from their detailed and carefully drafted overly ingenious arguments is any suggestion that our important national reclamation policy would be served

by continued adherence to the discredited Wilbur letter. Their efforts to portray the few hundred entities in whose behalf these proceedings continue as "family farmers" cannot obscure the actual characteristics of landownership in the Imperial Valley.

Statutory Construction

The plain terms of the Project Act require application of the 160 acre limitation. Section 14 provides that the Act is to be deemed a supplement to the reclamation law and is to govern the construction, operation and management of the authorized works, except as otherwise provided. Section 12 of the Project Act defines "reclamation law" as the Reclamation Act of June 17, 1902. The rule of construction governing the interpretation of cases arising under the reclamation law concerned with the acreage limitation was spelled out by this Court in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 292 (1958). The Court held that "where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment". There are numerous examples of reclamation projects where Congress has specifically relieved large landowners from the requirement of complying with the 160-acre limitation. The Boulder Canyon Project Act does not contain an express exemption. The efforts of petitioners to dissect each section of the Project Act in search of the hidden exemption merely illustrates that Congress declined to provide the relief in 1928 that the handful of excess landowners in the Imperial Valley have succeeded in obtaining from the Senate last year. S. 14, 96th Cong. 1st Sess. (1979), 125 Cong. Rec. S 12594 (daily ed. Sept. 14, 1979).

The various sections of the Project Act emphasized by petitioners as representative of an exemption make no mention of excusing compliance with the excess land law.

The Project Act involved more than a single state and some portions of the legislation were tailored to meet those unusual needs. However, none of the slight deviations from the general scheme of reclamation law are significant.

The Secretary's obligation under § 6 of the Project Act to satisfy present perfected rights was intended to assure that specific quantities of water would be available from the storage facilities in amounts approximately commensurate with usage prior to the Project. References to present perfected rights do not represent a shorthand means of excusing compliance with the acreage limitation.

Legislative History

The legislative history of the Project Act was primarily concerned with the issues of the proper apportionment of the waters from the Colorado River and the financial feasibility of the project. Very little was said concerning the anti-monopoly provisions of reclamation law. What finally emerged was § 14 of the Project Act incorporating reclamation law. The language of § 14 is similar to that in other reclamation legislation and the record does not show that anyone in Congress considered § 14 to require any less compliance with reclamation law in the Imperial and Coachella Valleys than in service areas of other reclamation projects. Since the acreage limitation occupies a keystone position in the reclamation law, it was incumbent upon petitioners to establish the clear legislative intent to excuse the large landowners of the Imperial Valley from compliance with the regulation of the water subsidy. Their briefs fail completely to establish any such Congressional intent. This inadequacy is understandable, for not even Secretary Wilbur, former Solicitor General Griswold or any of the other government officials who have favored petitioners' position have ever considered the legislative history to be helpful.

Administrative Practice

The administrative practice of ignoring the acreage limitation in the Imperial Valley arose out of a request from the attorney for the Imperial Irrigation District who sought a Solicitor's Opinion that the acre limitation did not apply, but specified that he did not want an opinion if the conclusion was adverse. A few days later, a letter was prepared for the signature of Secretary of Interior Wilbur. It was prepared without the assistance of the Solicitor of the Department of the Interior. At the time it was written, the All-American Canal contract had already been executed by the parties and the electors of the District had already voted to approve the contract. When the practice of nonenforcement began, it represented an abrupt change and a lone exception to the then prevailing practice governing enforcement of the acreage limitation where landowners receiving project water had preexisting "vested rights". The practice was then, and still is, that the acreage limitation applies despite the existence of pre-project water rights.

The Wilbur letter, containing few of the legal explanations offered by petitioners in this case for not adhering to the law, was never supported by a legal analysis in the Department of Interior. On each and every occasion when the informal letter was subjected to legal analysis, both its reasoning and conclusions were rejected. These rejections were from Interior Solicitor Harper in 1945, Solicitor General Rankin in 1958, Interior Solicitor Barry in 1964 and the Ninth Circuit in 1977. The Court of Appeals considered the Wilbur letter to be a "rather simplistic analysis not contained in a formal opinion" and there are few, if any, supporters to this day.

The administrative practice relied on by petitioners was not based upon legal analysis, but was simply inaction based upon previous inaction. Following the Opinion of

Solicitor Harper in 1945, the Department followed inconsistent practices under the Project Act by adhering to the Wilbur letter's conclusion that the acreage limitation did not apply in the Imperial Valley, while at the same time adhering to Solicitor Harper's Opinion that the acreage limitation did apply in the Coachella Valley. Both Valleys are serviced by the All-American Canal and both are treated identically in the Project Act. These inconsistent practices continued until December, 1964 when Solicitor Barry, in a formal opinion, rejected the substance of the Wilbur letter and changed the practice of nonenforcement with respect to the Imperial Valley.

The practice of nonenforcement commencing with the Wilbur letter was not designed to follow the principles of national reclamation policy. That policy is to encourage the establishment and maintenance of family-sized farms. The Wilbur letter did just the opposite by encouraging the maintenance of the large ownerships existing in the Imperial Valley since enactment of the Project Act and continuing until today. This practice, so patently wrong and directly in conflict with the purposes of the Reclamation Act, does not warrant being elevated into an administrative determination to which the Court should defer.

Res Judicata and Full Faith and Credit

The defense of the *res judicata* effect of the *Hewes* decision against respondents' intervention was not and could not be raised against the government because of sovereign immunity. Whatever imaginary problems petitioners encounter by reason of respondents' entry into the case (L.Br. 58) are no more than those anticipated when the government litigated the case in the district court. The issue is present now only by reason of the government's decision not to appeal the judgment of the district court.

The disfavored plea of *res judicata* does not bar respondents for a number of reasons. The *Hewes* case was not an adversary proceeding on the issue of the acreage limitation. Both the District and Malan wanted a determination that the acreage limitation did not apply. Furthermore, a determination of that issue was not necessary in a confirmation proceeding and, under California law, it was dicta and does not have preclusive effect. If the *Hewes* judgment is the proper subject for *res judicata*, then there are many well established principles recognized in both federal and state courts allowing the courts to refuse to entertain the plea where there has been a subsequent change in the law after rendition of the original decision or if its application would be contrary to important considerations of policy. Subsequent to the entry of the superior court's judgment, there have been many administrative and judicial refinements in the reclamation law, all contrary to both the *Hewes* judgment and the Wilbur letter. The acreage limitation represents one of the cornerstones of national reclamation policy and application of *res judicata* would be directly contrary to that policy.

Appealable Interest

Since the original plaintiff, the government, did not appeal, respondents' right to pursue the appeal requires a determination of whether or not they have an appealable interest. In turn, the latter turns on traditional standing to sue principles. Respondents' injury is their inability to buy excess lands in the Imperial Valley at below market prices. Under § 46, over a quarter million acres of some of the richest farm land in the world will be sold at below market prices if the decision of the court of appeals is affirmed. Respondents all reside in the District and most of them are agricultural workers. The Secretary of Interior has published proposed regulations

which would limit the ability of excess landowners to choose their own purchasers and assist respondents in purchasing these lands.

Under the unique procedure mandated by § 46 of the Omnibus Adjustment Act of 1926, respondents will have an unusual opportunity to purchase some of the richest farm land in the world at below market prices. The statutory mechanism for enforcing the acreage limitation is the use of the recordable contract. In order to receive project water for more than 160 acres in an individual ownership, the landowners must agree to sell their excess land at prices which do not take into consideration the value of a project.

Experience in the reclamation program shows that excess landowners never hesitate to execute recordable contracts. The former chief counsel of the Imperial Irrigation District stated to a Congressional committee that excess landowners are willing to execute recordable contracts in order to receive project water to irrigate their excess acres during the period of the contract. In the Imperial Valley, desert conditions prevail, and the landowners testified that they could not use their land for any purpose other than farming. Since they have a large investment in improvements in their lands, the only feasible means for obtaining a return on their improvements would be to sign recordable contracts, for the value of improvements is to be considered in the appraisals of excess lands.

Section 46 consists of two parts concerning the sale of excess lands. First, it provides that the Secretary shall exercise price control until there has been an initial breakup of excess lands. Second, after the initial breakup, § 46 provides that the Secretary may exercise price control only until one-half of the construction costs are repaid to the government. In the case at bench, since

the District has reached the half way mark during the course of this appeal, price control would be exercised only before the initial breakup.

ARGUMENT

I. THE PLAIN TERMS OF THE BOULDER CANYON PROJECT ACT MANDATE COMPLIANCE WITH THE ANTI-MONOPOLY PROVISION OF RECLAMATION LAW.

The numerous references to reclamation law appearing throughout the Project Act make it readily apparent that Congress intended this massive project to be a reclamation project subject to reclamation law. In the landmark case dealing with the 160-acre limitation of reclamation law, *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 292 (1958), this Court enunciated the controlling rule of statutory construction in cases concerned with the reclamation law:

> Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactments.

The Court's reasoning is not subject to challenge. Where special or unique circumstances exist so as to justify deviating from the well-recognized important considerations of national policy behind the 160-acre limitation, Congress has made clear, unambiguous, and specific exemptions from the excess land provisions of the federal reclamation laws. For example, the Act of June 27, 1952, 66 Stat.282 (San Luis Valley Project, Colorado) provides:

> The excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado. . . .

The Act of July 24, 1957, 71 Stat. 309 (Missouri River Basin, East Bench Unit) provides:

> Except as provided in section 2 of this Act, the excess land provisions of the Federal reclamation laws shall not apply to lands . . . of the East Bench unit of the Missouri River Basin project, . . . that are irrigated under existing State water rights, whether the waters used for their irrigation are passed through, regulated by, or stored in the Clark Canyon Reservoir by the United States.

The Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande Project, Mercedes Division) provides:

> The excess-land provisions of the Federal reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed.

There are numerous other similar examples of specific statutory exemptions.[124]

Before examining the various sections of the Project Act for hidden meanings, a few comments are in order concerning petitioners' approach to the *Ivanhoe* rule. With the agility to be envied by the best of broken-field runners, petitioners chart a long, tortured journey in search of a statutory exemption, beginning with "present perfected rights" under Article VIII of the compact, moving on to the decrees in *Arizona v. California* and finishing in the thicket of California water law. This roving excursion can

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[124] Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. § 386 (Colorado-Big Thompson Project); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt Projects); Act of August 28, 1954, 68 Stat. 390 (Owl Creek Unit, Missouri River Basin Project); Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. § 422(f) (small reclamation projects); Act of September 4, 1957, 71 Stat. 608 (Kendrick Project); Act of December 22, 1959, 72 Stat. 641 (Lower Rio Grande Rehabilitation Project, La Feria Division); Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. § 835a (Columbia Basin Project).

hardly satisfy the "exemption by express enactment" required by *Ivanhoe*. In apparent recognition of this shortcoming, the District contends that *Ivanhoe* does not apply because it was concerned with a different reclamation project where the factual circumstances were slightly different. Dist.Br. 21, 37. This sophistry is unavailing, for the entire thrust of the *Ivanhoe* rule of statutory construction was obviously intended to encompass *all* reclamation projects, because, as the Court reasoned, if there were factual circumstances which warranted an exemption, Congress would have made the "exemption by express enactment" rather than placing the burden on the courts to search out enigmatic meanings of simple terms.

Petitioners appear to be confused about this rule, for they repeatedly emphasize that the Project Act did not make specific reference to the 160-acre limitation. Nothing in this Court's decision in *California v. United States,* 438 U.S. 645, undermines the rule of construction as it relates to the acreage limitation. 438 U.S. 668-69, n. 21, 678, n. 31. The *Ivanhoe* rule was not a recent revelation of this Court, for it logically followed from the canon of strict construction applicable in cases of government grants. *E.g., Dubuque & Pacific R.R. Co. v. Litchfield,* 64 U.S. 66, 88-90 (1860):

> The reason of [this] rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which can not be obtained by plain and express terms.

The Court could have been speaking with specific reference to the Project Act, for its leader in the House was

Congressman Phil Swing, who has been referred to as "the talented chief counsel of the [Imperial] Irrigation District and a prominent valley spokesman almost from the day of his arrival in 1907 . . . In 1911, following his appointment as chief counsel for the district, he supervised the purchase of the water-delivery system from the Southern Pacific and made a study of water problems which convinced him of the need for federal help. As early as 1918, he had gone to Washington to push for 'one great irrigation project' for the entire basin, but his experiences persuaded him that the Valley would be better served by concentrating its efforts on an All-American Canal." Hundley, *Water and the West* 41-42. After leaving office, Congressman Swing was retained as a Washington lobbyist for the Imperial Irrigation District to lobby for appropriations for the construction of the All-American Canal. LX-AY

At the time the proposals leading up to passage of the Project Act were occupying the attention of Congress, various revisions of the general reclamation laws, culminating in § 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 14 of the Project Act states that "[T]his act shall be deemed a supplement to the reclamation law which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. Section 12 of the Project Act defines "reclamation law" to mean the Reclamation Act of 1902 "and the acts amendatory thereof and supplemental thereto." 43 U.S.C. § 617k. By operation of § 12 and § 14, the Project Act was incorporated into the framework of the reclamation laws, including § 46 that had recently been considered by Congress and that had been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of a main canal and appurtenant structures located entirely within the United States to deliver water from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, § 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 627c(b) mandates that reimbursement be secured by the Secretary of the Interior "by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law."

Section 14 of the Project Act reinforces the command of § 4(b) by providing that the "reclamation law shall govern the construction, operation and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explicitly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1979. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on the new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in § 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of § 46

apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

A. The water charge exemption in § 1 does not excuse compliance with the 160-acre limitation.

Section 1 of the Project Act provides that there is to be no charge for the "use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys". 43 U.S.C. § 617. The landowners contend that this water charge exemption means that Congress intended that the acreage limitation not apply to the Imperial Valley. They find their support, not in the statutory language itself, but in the informal Wilbur letter. It is obvious that § 1 does not even remotely suggest an exemption from the acreage limitation, for that section is simply another subsidy along with the 50-year interest-free repayment arrangement and the regulated flow of the Colorado River.

More importantly, landowners' argument about § 1 is proof positive of the utter lack of merit in the inconsistent contentions advanced by petitioners in this proceeding. When respondents filed their memorandum in opposition to the petitions for writs of certiorari, they pointed out the inconsistent administrative rulings and interpretations by Secretary Wilbur (exempting the Imperial Valley) and Solicitor Harper (concluding that the acreage limitation applied in the Coachella Valley). The District filed a reply brief in which it considered respondents' discussion of the inconsistent administrative interpretations as:

> . . . misleading because Coachella Valley County Water District has no present perfected rights which the Secretary must satisfy under § 6 of the Project Act. Delivery of water from the Colorado River to Coachella Valley did not commence until 1952; this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), restricts present perfected rights to quan-

> tities of water used prior to June 25, 1929, the effective date of the Project Act. Obviously, in places like Coachella that have no present perfected rights, § 6 of the Project Act (which requires the satisfaction of present prefected rights) is not applicable. Therefore, administrative construction of the Project Act with respect to Coachella Valley is not relevant to determining the proper application of § 6 to Imperial Valley. Dist.Reply Br. 5.

In their brief on the merits, the landowners also present an argument that the Coachella Valley is not in the same legal situation as the Imperial Valley. Their reason is that the government's contract with the Coachella Valley County Water District, the subject of Solicitor Harper's opinion, was "unlike the Imperial Irrigation District contract, [because] its purpose was to provide for construction of an irrigation distribution system for Coachella. The farmers in the Coachella Valley had no pre-existing rights to water from the Colorado River". L.Br. 15, n.14.

In urging the proposition on this Court that § 1 of the Project Act provides for an exemption from the acreage limitation, the landowners rely on statutory language providing the identical treatment to both the Imperial and Coachella Valleys. Thus, if § 1 provides an exemption for one Valley, it provides it for the other. At the same time, when officials of the Interior Department make inconsistent rulings relating to each Valley, peitioners then switch to the other side of the coin and tell the Court that there are different circumstances not stated in the statute which justify different treatment.

The purpose of § 1 was to insure that persons in the Imperial and Coachella Valleys would not be required to pay for the storage facilities in Lake Mead. The water charge exemption arose as an amendment to S. 728, 70th Cong., 1st Sess. 1927, sometimes known as "the Fourth

Swing-Johnson Bill" in the Senate Committee on Irrigation and Reclamation. At issue was the question whether Imperial Valley lands to be benefited by the water storage and regulation features of the Project should pay a charge for storage. Under the proposed legislation, those lands were already exempted from any repayment obligations for the cost of construction and maintenance of the main dam in Boulder Canyon which was to provide storage capacity, flood control and a hydro-electric power head. Senator Phipps of Colorado questioned this exemption:

> [M]any of the Senators have called attention to the practice under the Reclamation Law whereby every project that has been so far instituted has been required to pay not only for all canals for transporting the water, but also for the dams which retain the water for storage purposes. 70 Cong. Rec. 529 (1928).

The water charge exemption was a grant—a subsidy of free storage capacity and service—extended in consideration of the fact that Colorado River water had been appropriated and used for many years in the Imperial Valley as well as because of the division of opinion among members of Congress as to what effect should be given to the vigorously asserted claims to vested water rights by prior appropriation under state law which were made by Imperial Valley interests. While it was recognized that Colorado River water had already been used for irrigation purposes in the Imperial Valley at the time of the enactment of the Project Act (albeit unsatisfactorily), the basis for § 1 was because it:

> . . . might be questionable whether we would have the power to impose a charge upon them for the use of water. At any rate, I gave them [i.e., those representing the California side of the debate] the benefit of all doubt, and I offered this amendment, the effect of which, if adopted, would be that the Imperial Valley and the Coachella Valley will not be required to

make payment *for storage waters*. Senator King of Utah, 70 Cong. Rec. 528 (1928). (emphasis added)

In addition to the water charge exemption, § 1 also requires that "expenditures for . . . [the] main canal and appurtenant structures [are] to be reimbursable, as provided in the reclamation law, . . .". This provision for payment of expenditures "as provided in the reclamation law" is similar to requirement in § 4(b) of the Project Act where it is provided that the Secretary is to "make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of . . . [the] main canal and appurtenant structures in the manner provided in the reclamation law." It is hardly likely that the water charge exemption, when standing side by side with the requirement that repayment of construction costs be in the manner provided by reclamation law, was intended to exempt landowners in the Imperial and Coachella Valleys from any legal requirement except as specifically provided.

B. References to public lands in § 9 do not exempt private lands.

Petitioners make a half-hearted argument that the acreage limitation should not apply to private lands because § 9 of the Project Act provides for the disposition of public lands practicable of being irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h, Dist.App. 165a; L.Br. 36-37; Dist.Br. 13-14. Petitioners do not bother to explain the nature of § 9 or its purpose. That section says nothing about water delivery although there are many references to reclamation law in this section as elsewhere throughout the Project Act. Petitioners' argument was summarily disposed of by the Ninth Circuit. 559 F.2d at 531-32.

Examination of § 9 shows that it directed the Secretary to withdraw lands capable of being irrigated and reclaimed from entry and authorized reopening them to entry at a later date. Those lands subsequently opened for entry throughout the area serviced by the Project Act (not limited to the Imperial Valley), were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. An exclusive entry preference was granted to veterans for a period of three months, subject to the qualifications of 43 U.S.C. § 433.

Petitioners' argument is that the references in § 9 to the acreage limitation being applicable to public lands means Congress "gave thought about the extent that it wanted acreage limitation to be applicable under the Project Act". L.Br. 36. As noted by the Ninth Circuit, landowners are reading too much significance into § 9's reference to the limit of 160 acres for tracts opened on public lands as well as to the other numerous matters referred to in that section. Reference to a 160 acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, § 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law"—a general reference to reclamation law similar to the general reference in § 14. Similarly, the exclusive preference given to veterans by § 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,[125] so this preference had to be qualified by a specific reference to 43 U.S.C. § 433.

[125]The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 185. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787).

As the court succinctly observed, to use these two minor qualifications by reference in § 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing these laws, the specific incorporation of reclamation law in § 14 and the lack of any specific exemption from the operation of the excess land laws in the Project Act, puts a far too strained reading on § 9 which cannot be accepted. Petitioners do not attack this part of the Ninth Circuit's opinion.

C. Section 4(b) is not an express exemption from reclamation law.

The Project Act was multi-state in nature and because of the size of the project, Congress provided in § 4(b) that the Secretary was required to obtain a repayment contract prior to the appropriation of funds for construction instead of contracting before the delivery of water, as provided in § 46 of the 1926 Act. Although § 4(b) was, by its very terms, to require the repayment contract to conform to reclamation law, landowners contend that the reference to reclamation law is meaningless and that the slight variation in the contracting procedure constitutes an express exception within the meaning of § 14 of the Project Act. The flexibility granted the Secretary in making provisions for repayment under § 4(b) is quite obviously designed to give him greater latitude in obtaining repayment for the huge expenditure of public funds. There is absolutely no language in § 4(b) (or elsewhere in the Project Act, for that matter) which may reasonably be considered to exempt the landowners in the Imperial Valley alone from complying with reclamation law. Congress has provided clearly defined exemptions in other circumstances, and could have done so with respect to the Project Act if that was what Congress intended. As noted by the Ninth Circuit, the

Project Act's modification of § 46 "deals only with the time for securing repayment and does not mean that all other substantive provisions of Section 46 are incompatible with the Project Act". 559 F.2d at 530. If the Secretary "otherwise" secures repayment under petitioners' theory, § 4(b) still requires that repayment be done "in the manner provided in the reclamation law".

D. Landowners have rendered § 14 meaningless.

Landowners are seeking to have § 14 of the Project Act considered as meaningless surplusage. L.Br. 39-42. Other references to reclamation law in the Project Act did not negate the implication of § 14, but emphasized its importance. Since landowners cannot point to an express exemption, they are seeking to establish an implied exemption but to no avail.

The language in § 14 is not unique. Its references to the requirement that reclamation law is to govern the "construction, operation, and management" of the project works is not capable of being interpreted to exclude the acreage limitation. Similar language is found in the enabling legislation for the Central Valley Project in California, the Rivers and Harbors Act of August 26, 1937, 50 Stat. 850, as amended by the Act of October 17, 1940, 55 Stat. 1199. Section 2 of the 1937 Act, provides in part:

> . . . except as herein otherwise provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project. . . .

Section 2 of the 1940 Amendment to the Central Valley Project Act adds authority to construct distribution systems "under the provisions of the Federal reclamation

laws". The language in each instance is substantially the same as that in Section 14 of the Boulder Canyon Project.

The Court found this language sufficient in *Ivanhoe* to represent a Congressional mandate requiring compliance with the acreage limitation. It is directly contrary to landowners' claim that these terms had no reference to the use and distribution of project water in the Imperial Valley.

If Section 14 applied only to unspecified "business and fiscal aspects of project management and not to matters of social control, such as acreage limitation, governing water deliveries" (L.Br.40), it would have been a simple matter for Congress to say that in plain terms. Instead, Congress used terminology in § 14 almost identical to that in the Central Valley Project Act. Similar language appears in Section 8 of the Flood Control Act of 1944, 58 Stat. 891, 43 U.S.C. § 390, ". . . the Secretary of the Interior is authorized to construct, operate and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof, or supplementary thereto)," The latter was held to require compliance with the reclamation laws. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1096 n 4, 1118. Petitioners have not pointed to a single instance where similar language in a project-authorizing statute has been accorded the limited interpretation suggested here.

In a footnote, landowners run the gamut through §§ 10, 5, and 8 of the Project Act in search of the elusive exception negating § 14. These various references throughout the Project Act were considered by the court of appeals as nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Project Act, but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law.

559 F.2d at 531. The landowners have not demonstrated any error in this analysis.

E. The satisfaction of present perfected rights is not an indirect exemption from the acreage limitation.

The alleged inconsistency of § 6 of the Project Act with § 14, and therefore, § 46, is the heart of petitioners' case. The concept of present perfected rights has its source in Article VIII of the Colorado River Compact. Dist.App. 168a. Before delving into an analysis of this claim, a few preliminary matters should be considered.

Nobody involved in the administration of the Project Act ever considered the possibility that § 6 was in conflict with § 46. The entire cast of characters in the drama of the closing days of Secretary Wilbur's term of office, Messrs. Ely, Dent and Coffey, made no mention of it and apparently did not even consider § 6 to be of sufficient relevance to discuss it among themselves before preparing the letter for the Secretary's signature. Attorney Childers of the Imperial Irrigation District did not mention § 6 when he requested a favorable ruling from the Solicitor. Neither the parties in *Hewes* nor the opinion of the superior court made any reference to present perfected rights. B.P. King, the Staff Attorney with the Bureau of Reclamation in Billings, Montana, upon whose analysis petitioners place such heavy reliance, said nothing about § 6. Surely, if the concept of present perfected rights was in direct conflict with the anti-monopoly provisions of reclamation law, at least one, if not all of the officials who considered the question, as well as the attorney for the District, would have mentioned it.

It will not do to obfuscate this glaring shortcoming in the administrative history of the Project Act as did petitioners when seeking the grant of certiorari. The landowners suggested that present perfected rights is a considera-

tion only because of this Court's mandate in *Arizona v. California*. L.Reply Br. 2. The District stated that the reference to "vested rights" is a secret code for present perfected rights and was therefore sufficient. Dist.Reply Br.6. But this Court did not originate the concept of present perfected rights. Its source is in Article VIII of the Compact, approved by the Commissioners in 1922 at Santa Fe and by Congress when it enacted the Project Act in 1928. It became effective when President Coolidge proclaimed the Project Act effective on June 25, 1929. The "vested rights" referred to in the Wilbur letter did not purport to rely on § 6 or any other section of the Project Act. The letter relied upon an erroneous view of the then applicable administrative practice regarding "vested rights" and, presumably, there would have been no hesitation to rely on § 6 to assist the District if that section was deemed relevant.

The first mention of present perfected rights in the administrative history occurred when Solicitor Barry filed his Opinion in 1964. In the course of his analysis of the language of the Project Act, he referred to § 6 and its requirement for satisfaction of present perfected rights and concluded that it could not be read as insulating the lands in the District from the acreage limitation. 71 I.D. 511, Con.App. 199a. The subject was then raised by the landowner-petitioners, for the very first time, in a meeting on October 1, 1965 between Solicitor Barry and attorneys Warren M. Christopher and Allyn Kreps, representing the excess landowners of the Imperial Valley. Messrs. Christopher and Kreps requested an opportunity to submit a memorandum to Solicitor Barry concerning the conclusion of his opinion. Pl.Exs. 51, 52. The memorandum was submitted by the landowners' attorneys and raised the issue of § 6. Pls.Exs. 55, 56, 57.

Individual water rights have never been adjudicated by this Court in the *Arizona v. California* litigation. In the supplemental decree issued January 9, 1979, 439 U.S. 419, it was decreed, by stipulation, that the Imperial Irrigation District would have present perfected rights in annual quantities not to exceed 2,600,000 acre-feet of diversions from the main stream, or the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres, and for the satisfaction of related uses. There is nothing in the decree that states, specifically or otherwise, that the water may be delivered free and clear of the requirements of reclamation law. The decree does not specify the particular 424,145 acres for which the water is to be delivered. The District's assertion that the court of appeals decision means that the Secretary will deliver much less than the decreed quantity to irrigate less than the decreed area, is pure sophistry. When the District complies with § 46 by requiring the landowner-petitioners to execute recordable contracts, water deliveries will continue as at present. When the sales of excess lands actually take place, the identical quantity of water will be delivered to the District for the identical number of acres. If an excess landowner declines to execute a recordable contract and allows his excess lands to revert to desert, he will not be entitled to water deliveries for his excess acreage and nothing in this Court's most recent decree provides otherwise.

Section 6 of the Project Act does not specifically provide that individual water rights are to be satisfied without respect to § 46. Presumably, Congress could have provided explicitly for an exemption in the Project Act as it did in other reclamation projects having clear, specific exemptions. Since petitioners deny that the Project Act is a reclamation project, they cannot rely on § 8 of the 1902 Act, where it is provided that:

> Nothing in this act shall be construed as affecting or intended to affect, or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act shall proceed in conformity with such laws, and nothing herein shall in any way affect any right or any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof; . . . 32 Stat. 390; 43 U.S.C. §§ 372, 383.

Section 8 appears at first blush, as does § 6 of the Project Act and Article VIII of the Compact, to recognize state water rights as being superior to the mandates of federal reclamation law. While some state water policies are recognized as being dominant, this Court recognized in *Ivanhoe* and *California v. United States* that the acreage limitation set out in § 5 of the 1902 Act was an explicit congressional directive indicating that Congress intended state law to control only where not inconsistent with § 5. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 291-92; *California v. United States,* 438 U.S. 645, 668 n. 21, 671-73, 678 n. 31. If § 6 of the Project Act was intended to be a counterpart to § 8 of the Reclamation Act of 1902, the identical principles enunciated by this Court in *Ivanhoe* and *California v. United States* would be applicable. However, a more realistic appraisal is that the concept of present perfected rights was, as determined by the Ninth Circuit, intended to simply indicate that a certain quantity of water is to be provided to the District in recognition of its pre-project appropriations. There is nothing in the legislative history weighing against such an interpretation. As noted by the Court in *California v. United States,* the State of California was an appellant in *Ivanhoe* and, at least at that time, supported a legal position completely at odds with the present position of petitioners, which is adopted by California in its brief to this Court in the present case.

In *Arizona v. California,* the Court held that the Secretary could not be bound by state law in disposing of water under the Project Act where state law is inconsistent with federal law. 373 U.S. at 587. That holding, while dictum, was disavowed in *California v. United States* only to the extent that it would prevent states from imposing conditions on the use of their water by the United States not inconsistent with congressional directives. 438 U.S. at 674. Thus, although the specific question of the purported conflict between present perfected rights and the 160-acre limitation found in § 46 of the 1926 Act and § 5 of the 1902 Act has never been adjudicated, all reported decisions concerning similar conflicts with § 8 have been resolved in favor of the explicit command of § 5.

(i) Nothing in the Colorado River Compact or § 6 of the Project Act suggests the inapplicability of reclamation law

In its Reply Brief filed by the District in support of its petition for certiorari, the District told this Court that "the subject of present perfected rights was never briefed or argued in the Court of Appeals, . . ." (p. 6). Landowners make a similar representation. L.Br. 32. This was obviously a misstatement, for the district court considered present perfected rights to be "repugnant to the concept" of acreage limitation. 322 F.Supp. at 18. The issue was fully briefed in both the District Court and the court of appeals. The court did not manufacture the issue itself in order to decide it.

The Ninth Circuit rejected petitioners' claim that § 6 is an exemption from the acreage limitation, 559 F.2d at

527-530, and the relevant part of its opinion, with footnotes renumbered, is set out at this point.

> Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. *Arizona v. California, supra,* 373 U.S. at 580. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." *Id.* at 584. 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."[126] The term "present perfected rights" from the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. *Arizona v. California, supra,* 373 U.S. at 566.[127]
>
> The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C.

[126]Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong. Rec. 324 (1928).

[127]The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona v. California, supra,* 373 U.S. at 566.

> § 617m. It is the landowners' position that the qualifying clause of Section 14, "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.[128]
>
> A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. *Arizona v. California,* 376 U.S. 340, 341 (1964).[129] In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law.[130] Examination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected

[128]This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

[129]As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona v. California, supra,* 373 U.S. at 586-587, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

[130]It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote [128], *supra.*

rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in *Arizona v. California, supra,* 376 U.S. at 351-352, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. *Merchants National Bank of San Diego v. Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904).[131] The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, *Id.* These principles of ownership have been specifically applied to the Imperial Irrigation District. *Hall v. Superior Court,* 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any

[131]Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield,* 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. *Madera Irrigation District v. All Persons, supra,* 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial

> Irrigation District owns the water rights for the common benefit. *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

There is ample support for the decision reached by the court of appeals. The *Arizona v. California* litigation determined the issue of whether or not the apportionment of water related to the mainstream alone, or included the tributaries. In fact, both the special master and the Court treat the Project Act as a reclamation project and make clear that present perfected rights mean only that the State of California, including the Imperial Irrigation District, will be provided with the same quantity of *stored* water that was previously diverted from the mainstream itself. Both the special master and this Court make it clear that they were *not* making a determination of the rights of individual water users in the respective states. "The basic controversy in the case is over how much water each state has a legal right to use out of the waters of the Colorado River and its tributaries." 373 U.S. at 551. The special master declined to determine the rights of competing users within the same state. Report of Special Master 218-19. Paragraph VIII of the Decree provides: "This Decree shall not affect (A) The relative rights *inter sese* of water users within any one of the States, except as otherwise specifically provided herein." 376 U.S. at 352. Thus the compact in no way attempts to regulate the use of water within a particular state. No reference is made in either the Compact, Project Act or this Court's opinion or decree to freeing the individual water users within the basin states of the anti-monopoly provisions of reclamation law because of present perfected rights.

In addition, Secretary of Interior Hubert Work described Article VIII of the Compact as relating to the total volume of water for a state as a geographical area, not for individual water users:

> This appears to afford ample protection and assurance to those States included in the upper division of the watershed against creation of a priority of right through the building of these works, which would impose in any way their right to the *volume* guaranteed to the division in the compact. Letter from Secretary Work to Charles L. McNary, Chairman, Committee on Irrigation and Reclamation, *Hearings on H.R. 6251 and H.R. 9826,* Before House Comm. on Irr. and Reclamation, 69th Cong. 1st Sess., Part 1, p. 8 (1926). LX-DD, D.

The contention that landowners' individual water rights are somehow protected by the Compact is patently without merit. In the years between 1895 and 1899 in the Imperial Valley, notices of appropriation were filed by three individuals for the right to divert 10,000 second feet of water which translates into about 6,500,000-7,000,000 acre feet per year in the Imperial Valley. These individuals, named Rockwell, Gender and Heffernan, assigned those notices to the California Development Company for whom they were principals, on the same date as the recording. 1 CR 12. Even though Rockwood established a claim to 10,000 cubic feet of water per second in 1899, the United States government refused to approve his diversions from the river in 1904. When he filed for his diversions, he overlooked the fact that the government of the United States, as well as that of Mexico, considered the Colorado to be a navigable stream and permission to divert water had to be obtained from the Department of War and he had neglected to do so. In 1903, the reclamation service announced that the California Development Company's diversions were illegal. Hundley, *Water and the West,* 24.

In the Court's supplemental decree of January 9, 1979, 439 U.S. 419, the Imperial Irrigation District is entitled

to annual quantities not to exceed 2,600,000 feet from the mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses. The Court said nothing about individual water rights within the district and did not identify the specific acreage to which the water is to be delivered.

(ii) State water rights do not exclude application of the 160-acre limitation

In their summary treatment of state water rights, landowners suggest that water rights held in trust by an irrigation district under state law are immune from compliance with the acreage limitation. L.Br. 32. There is no such immunity, and the California statute authorizing the District to enter into the All-American Canal Contract explicitly deferred to federal law on matters of distribution and apportionment of water:

> All water, the right to the use of which is acquired by the District under any contract with the United States shall be distributed and apportioned by the district in accordance with the acts of Congress applicable thereto, . . . 1917 Cal. Stat. 245, § 4, now codified in Cal. Water Code § 23200[West].

Many years ago it was recognized that any purported "vested rights" of landowners in the District would have to give way to federal law under the Project Act and the compact. *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 532-33 (9th Cir. 1932).

Landowners are literally correct when they state that "acreage limitation has been permitted only where the water right belongs to the Federal government, not the District". L.Br. 32, n 26, citing *Ivanhoe Irr. Dist. v. All Parties*, 53 Cal.2d 692, 704, 350 P.2d 69, 75, 3 Cal.Rptr. 317, 323 (1960). However, they cast the proposition in a misleading fashion, for *Ivanhoe* has been the only case to consider the application of acreage limitation against a claim of state water rights. Furthermore, it is hard to conceive of a dispute over this issue which would not include some reference to state water rights, for most reclamation projects are in areas having previously developed irrigation facilities. The decision in *Ivanhoe* was not based upon the simple proposition that the water rights belonged to the federal government. As Justice Peters put it in the landowners' reference, this Court held that "the Federal government either had title to the water free of trust or could, by direct or inverse condemnation, secure such title." That proposition also applies to the Project Act. The Colorado River is a navigable stream, and the government is in the exact same position with respect to the Colorado as it was with respect to the San Joaquin, Sacramento, and Trinity Rivers involved in the Central Valley Project. Even though Congress elected to recognize state created water rights in § 8 of the Reclamation Act, that recognition does not foreclose application of the acreage limitation. If state water rights are taken or adversely affected by the government in the operation of a reclamation project, either directly or indirectly, the government is subject to a claim for compensation in another forum. *United States v. Gerlach Live Stock Co.*, 339 U.S. 275, 737-39. (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 291. The government may "regulate that which it subsidizes". *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. at 296.

Even under the water law of California, the right of a landowner to the use of water appurtenant to his land is not absolute. His right to use the water may be subject to a tolling charge based on the quantity of water diverted. *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726, 258 P. 959, 965-66 (1927). He may lose that right upon refusal to pay for its use. *Leavit v. Lassen Irr. Co.*, 157 Cal. 82, 106 P. 404, 409 (1909). His appropriative or

prescriptive right to water matures only when the means of transporting the water to the places used is constructed. *San Bernardino Mun. Water Dist. v. Meeks & Daley Water Co.*, 226 Cal.App.2d 216, 222, 38 Cal.Rptr. 51, 54 (1964). If a landowner's water rights are not absolute property rights under California law, there is no policy requiring that his rights would be greater under federal law.

Landowners' reliance upon this Court's statement in *Arizona v. California* that the guarantee of § 6 was a matter of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective" (376 U.S. at 584), is misplaced. L.Br. 33. That comment was made immediately following a discussion of the Secretary's obligations to apportion water among the various states. There is not a single word in any of the *Arizona v. California* opinions or decrees denying the application of the acreage limitation. It is the landowners, not Congress or the court of appeals, that is playing word games. If Congress had intended to pass legislation which would excuse a handful of individuals, partnerships and corporations owning more than a quarter million acres of land from the important national policy, it would have and could have done so explicitly, rather than resorted to the "word games" alluded to by landowners.

II. THERE IS NOTHING IN THE LEGISLATIVE HISTORY TO INDICATE THAT CONGRESS INTENDED TO EXEMPT THE IMPERIAL VALLEY FROM THE ANTI-MONOPOLY PROVISIONS OF RECLAMATION LAW.

The language of the Project Act is sufficiently clear to enable the Court to determine its meaning. For ambiguities, if any, the *Ivanhoe* rule of construction provides guidance. Since the meaning of the words of the statute is discern-

able, it should be unnecessary to psychoanalyze Congress to determine what it meant but forgot to enact.

Moreover, examination of the legislative history of the Project Act is of academic interest only, for the congressional debates were concerned almost exclusively with the apportionment of water among the basin states and the financial feasibility of the project. After reviewing the many legislative materials submitted by the parties concerning the various Swing-Johnson bills, the Ninth Circuit observed that "the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meagre. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that can not be found in the actual language of the Project Act." 559 F.2d at 532. Even one of petitioners' champions, former Solicitor General Griswold, concluded that the "legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's [Assistant Attorney General of the Lands Division] memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction on that any of these items of legislative history have any close relation to the statute as it was finally enacted." 126 Cong. Rec. S 1632 (daily ed. Feb. 20, 1980). At the same time, the landowners state that examination of the legislative history "shows that the administrative practice initiated by Secretary Wilbur in 1933 faithfully reflected the congressional intent". L.Br. 44. The District tells us that during the ten year legislative history of the Project Act "the subject of acreage limitations was thoroughly debated in the committees and on the floors

of Congress." Dist.Br. 38. Both petitioners are completely wrong, and their briefs are notably lacking in substantial citation to meaningful authority.

The legislative history of the Project Act was scrutinized by the Ninth Circuit during the three and a half years the case was under submission. That history, as summarized by the Court at 559 F.2d 532-36, is a fair narration of the few occasions when the issue of acreage limitation was mentioned and is set out at this point verbatum, except for footnotes which have been re-numbered.

> A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measure that ultimately became the Project Act, the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.
>
> The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress.[132] A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, redrafted, and re-introduced as H.R. 9826. As redrafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

[132]The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley.[133] At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i.e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract.[134]

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.[135] Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the

[133]While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.*, 13 Natural Resources Journal 1, 4 (1963).

[134]Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pp. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

[135]Act of February 21, 1911, ch. 141, 36 Stat. 925.

reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive.[136] It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."[137] During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.[138] Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage

[136]Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

[137]Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

[138]68 Cong.Rec. 4291-4292 (February 21, 1927).

limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the meantime, a Senate bill, S. 728, sponsored by Senator Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which

did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.[139]

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irrigation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill.[140] This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928, Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."[141] The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is

[139]Senate Report No. 592, 70th Cong., 1st Sess. (1928) at pp. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id., Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

[140]69 Cong.Rec. 7634-7635 (May 2, 1928). See also 69 Cong.Rec. 9451 (May 22, 1928).

[141]70 Cong.Rec. 67 (December 5, 1928).

noteworthy that at this time Senator Hayden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.[142]

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres.[143] However, he made only a brief passing reference to the issue in a speech opposing the bill that extends over some 32 pages in the Congressional Record.[144] During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.[145] Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of

[142]70 Cong.Rec. 71-81 (December 5, 1928).

[143]70 Cong.Rec. 289 (December 8, 1928).

[144]70 Cong.Rec. 277-298, 314-323 (December 8 and 10, 1928).

[145]The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong.Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong.Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a

Congressional committee.[146] Similarly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. *United States v. Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Cf. *National Automatic Laundry and Cleaning Council v. Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C. Cir.1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponents' statements correctly indicate the views of the bill's proponents, *Arizona v. California, supra,* 373 U.S. at 583 n. 85. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 n. 24 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley

[146]To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as inadequate for reasons unrelated to the acreage limitation provision.

from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be less of a need to find a specific exemption for the Imperial Valley in the legislative history.[147]

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previously unproductive and lands previous productive because irrigated by non-federal projects. Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. *United States v. Tulare Lake Canal Co., supra,* 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.
Id. at 1143.

A. The few excerpts from committee hearings relied upon by petitioners are inconclusive at most.

Out of eight years of legislative proceedings leading up to the final adoption of the Project Act in 1928, petitioners have been able to locate two possible references to the subject of the acreage limitation. Dist.Br. 40-41; L.Br. 44-45. The first reference is to a response from Commissioner Mead who was asked by Congressman Sinnot whether or not H.R. 9826 contained any provision "on a farm unit on the lands to be irrigated", and the Commissioner replied, "As to the old land, it would be sold under a Warren contract." *Hearings on H.R. 6291 and H.R. 9826,* Before Comm. on Irrig. and Reclamation, 69th Cong., 1st Sess. 32-33 (1926). As noted by the Ninth Circuit, at the same time the Commissioner told the Committee that the bill permitted landowners to retain their farms intact, he added that "old land", i.e., lands presently irrigated without the benefit of a Federal reclamation project, would be sold under a Warren Act contract. The court noted that the Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525 and, under that Act, water stored by a Federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within government reclamation projects". 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in § 46 (§ 46 had not yet been enacted), does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524. Thus, Commissioner Mead was technically correct in testifying that the owner of "old land" could have been sold water for 160 acres, while continuing to occupy his excess acreage, although his "excess lands" could not receive project water. The substance of his statement leads to a conclusion wholly at odds with that urged by petitioners.

The sum and substance of the "consistent" and "deliberate" purported intention of Congress to exempt the Imperial Valley alone from the acreage limitation is found in a grand total of two words spoken during all of the hearings

[147] The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

in the House and Senate and occurred while considering one of the earlier versions of a bill which ultimately became the Project Act. Congressman Swing said, "No sir" when asked whether or not the bill required a landowner to sell his excess lands. As the Ninth Circuit pointed out, this statement was not made with reference to any particular portion of the bill, and was accompanied by Congressman Swing's misleading testimony that there were only one or two land-holdings in the Imperial Valley. 559 F.2d at 532. This statement was made prior to adoption of § 46 of the Omnibus Adjustment Act and at a committee hearing two years before a later version of the Project Act was approved by Congress. When these bills were reported, there was no colloquy on the floor of either house between opponents and proponents of the acreage limitation which indicates that the issue was squarely presented to the Congress as a whole.

Whatever the significance of the statements by Commissioner Mead and Congressman Swing, Secretary of Interior Hubert Work made it clear and unambiguous that the bill before the House Committee at that time (1926), H.R. 9826, would be subject to all of the requirements of reclamation law. In a letter attached to the House committee report on H.R. 9826, Secretary Work viewed the proposed Boulder Canyon Project Act as a "supplemental" water project subject to reclamation law:

> In the sale of water to irrigation districts and municipalities, the provisions of the reclamation act and of the Warren Act would apply. H.R.Rep. No. 1657, 69th Cong., 2d Sess. 22 (1926), Pl. Ex. 68h.

B. The legislative proceedings concerning H.R. 9826 and S. 3331 do not support an implied exemption from the 160 acre limitation.

Landowners have pulled together bits and pieces from the legislative proceedings concerning H.R. 9826 and S. 3331

in 1926. There is no support for their contention that it was "clearly understood" that the acreage limitation could not apply without an express inclusion of that provision in the bill. H.R. 9826 contained, for the first time, a provision making the Project Act a "supplement to the reclamation law, which said reclamation law shall govern the construction, operation and maintenance of the works herein authorized . . ." This language was in § 13 of H.R. 9826, the genesis of § 14 of the Project Act as adopted in 1928. It has been deemed sufficient to require the application of reclamation law, as does similar language generally used in all project bills.

The Senate committee report on S. 3331 specifically provided that reclamation law was to apply to this Project:

> Section 13 [predecessor to Section 14 of the Project Act as adopted] declares the act to be a supplement to the reclamation law, which is made to govern where not inconsistent.
>
> In a great project such as this many details may properly be referable to a general law such as the reclamation act. S.Rep. No. 654, pt. 1, 69th Cong., 1st Sess. 28 (1926).

It is significant that these proceedings concerning H.R. 9826 and S. 3331 occured prior to or contemporaneously with the adoption of § 46 of the Omnibus Adjustment Act, where the details of the acreage limitation are found. If, as petitioners suggest, Senator Phipps truly believed that a specific acreage limitation provision was necessary (L.Br. 47-48), he would certainly have raised the subject on the floor of the Senate and someone would have responded to him. Instead, Congress adopted § 46 in 1926 containing the recordable contract requirement sought by Senator Phipps. It appears that the combination of § 46 and § 14 of the Project Act provided everything he thought to be necessary. Furthermore, Senator Johnson himself inter-

preted this third Swing-Johnson bill on the floor of the Senate by emphasizing the fact that the then pending bill was made subject to the reclamation law. He notably failed to make any mention of a possible statutory exemption for the landowners of the Imperial Valley because of present perfected rights or any other reason:

> Regarding this canal, it may be said: . . . It will through water sales to old and new lands, and the disposal of power or power rights on the canal, repay within a reasonable period all Government advances for its consideration. 67 Cong.Rec. 12622 (1926)
>
> • • •
>
> Under this bill, . . . *we make the entire project a part of the reclamation law. This is a reclamation measure:* and by section 13 of the bill, it is distinctly provided [Section 13 quoted] 68 Cong.Rec. 4291 (1927) (Emphasis added)
>
> • • •
>
> I have called your attention to the fact that this bill is made a part of the reclamation law; . . ." 68 Cong. Rec. 4292 (1927).

Senator Phipps' proposed amendment to S. 3331 never received any consideration in the Senate and never came to a vote. He was apparently satisfied that his amendment was unnecessary.

C. S. 728, neither explicitly nor implicitly, called for an exemption from the acreage limitation.

The progress of S. 728, and S. 1274 authored by Senator Phipps, was analyzed in detail by the Ninth Circuit. 559 F.2d at 534-36. Landowners emphasize that S. 1274 contained an express acreage limitation provision and therefore, they conclude, Senator Phipps and probably the entire Senate did not consider the language of present § 14 to be sufficient to require the application of reclamation law. Landowners do not tell this Court the S. 1274 was not

reported out of committee. The inference they seek to draw from this rejection, that the committee was rejecting inclusion of an acreage limitation provision, finds no support in the record. The failure to report S. 1274 had nothing to do with acreage limitation, but it was objectionable in other respects. In a letter to Senator Phipps from Secretary of Interior Hubert Work, the Secretary reported that he could not recommend approval of S. 1274 because it did not authorize construction of power generating facilities necessary to make the Boulder Canyon Project feasible:

> S. 1274 does not authorize the construction of a power plant and incidental structures suitable for the fullest economic development of electrical energy. The revenue to be derived from the sale of power is necessary to render the project feasible. S. Rep. No. 592, 70th Cong., 1st Sess. 31 (1928)

For this reason, and apparently no other, Secretary Work recommended approval of Senator Johnson's bill, S. 728. In doing so, the Secretary noted that S. 728 was similar to H.R. 5773, despite the fact that the latter contained a specific provision for the 160-acre limitation, while the former did not. It is therefore unlikely that Secretary Work would have considered S. 728 and H.R. 5773 similar if they were in fact, dissimilar, on the very important aspect of acreage limitation. It should be recalled that only two years earlier in his letter attached to the House committee report on H.R. 9826, an earlier version of H.R. 5773, Secretary Work advised the House committee that the provisions of the Reclamation Act would apply under H.R. 9826 which then contained language identical to present § 14.

Thus, the landowners' inference that S. 1274 might have been rejected because it contained a specific acreage limitation provision for private lands is simply not correct. It was rejected because it did not authorize construction

of power-generating facilities without which the Project Act would not be feasible. Neither Secretary Work's views nor the Committee Report disclosed any opposition to imposition of acreage limitations on private lands.

The statements made on the floor by Arizona Senators Hayden and Ashurst during the course of their filibuster (L.Br. 49-50) were not responded to and were apparently not taken seriously by anyone. The comments of Senator Ashurst were made in a passing reference in a speech extending over 32 pages in the Congressional Record. It is indeed a shaky business to rely upon charges leveled at a bill by its principal opponents. The issue was far from "drawn as to whether acreage limitation should be imposed in Imperial Valley" as suggested by the landowners. Rather, it appears to be a classic case of the principal opponents of a bill attempting to talk it to death. Significantly, the issue never came to a vote and there was no response to their charges that the reclamation law would not apply to the Imperial Valley.

Landowners acknowledge, as they must, the observation of the court of appeals that the substitution of S. 728 for H.R. 5773 by Senator Johnson, was represented by Senator Johnson as being similar bills having "like purposes and like designs". L.Br. 50-51. The purpose of substituting S. 728 for H.R. 5773 was explained by Senator Pittman of Nevada. The reason was because of the determination of the Senate to require the cost of constructing the All-American Canal to "be borne exclusively by the land to be benefitted, the same as on any other reclamation project. That [S. 728] is the bill we are considering." 70 Cong. Rec. 230 (1928). Under the House version, the entire cost of the project, not only of the dam and reservoir at Black Canyon, but also the All-American Canal was to

be paid from revenues from power derived from waters impounded behind Boulder Dam. *Ibid.*

> Mind you, as the Senate bill now under consideration eliminates the cost of the All-American Canal as a burden upon the resources received from power . . . 70 Cong. Rec. 231. (Senator Pittman)

As the Senate passed Senator Johnson's motion to substitute S. 728 for H.R. 5773, Senator Norris, no friend of speculators, observed:

> The House bill contains, in effect, the amendment known as the Davenport amendment, which the Senator from Idaho offered and withdrew. In my view of it, that constitutes the principal difference between the House bill and the Senate bill. 70 Cong. Rec. 602

Landowners' reference to Senator Ashurst's statements as to the possible nonapplicability of the 160-acre limitation did not constitute any substantial basis for his opposition to the Project Act. 70 Cong. Rec. 289. Senator Ashurst was concerned primarily with the deprivation of Arizona's share of Colorado River water by California and he offered a total of 90 amendments by the time of the merger of the Senate and House bills. 70 Cong. Rec. 67.

Objections of Senators Hayden and Ashurst were not based upon the purported failure to provide for the 160-acre limitation. As Senator Hayden stated in the very first day of Senate debate in 1928:

> I owe it to the senior Senator from California [Hiram Johnson] to say that I speak for the people of a State who are thoroughly familiar with the Colorado River Problem and who are united in their opposition to the Boulder Dam bill as it passed the House of Representatives. There is not now and never has been any substantial support for that measure in Arizona. Regardless of how they differ on other questions all political parties and every class and character

of the citizenship of that State opposed the House Boulder Dam bill. 70 Cong. Rec. 69.

Senator Hayden said that both political parties in Arizona were united in "resisting the grave injustice which the Boulder Dam bill, as it passed the House of Representatives, does to the State of Arizona." 70 Cong. Rec. 69. Even the specific provision in § 1 of the House bill (H.R. 5773) referring to the 160-acre limitation was not sufficient to satisfy Arizona interests. During the 69th Congress in the first half of 1928, Senator Hayden stated the three primary or fundamental objections of Arizona to the Project Act:

> 1—The bill seeks to use the power of the federal government to coerce a sovereign state to its injury, and to the benefit of another state.
>
> 2—An unjust division of the water of the lower Colorado River Basin.
>
> 3—The absence of a provision for compensation to the States of Arizona and Nevada for the use of their natural resources, their lands, and their waters, for the generation of hydroelectric power. 69 Cong. Rec. 7630.

Once again, landowners place their sole reliance for psychoanalysis of Congress on the charge of the bill's principal opponent, Senator Ashurst of Arizona. The utter lack of merit in landowners' contention is shown by the fact that Senator Johnson was required to obtain unanimous consent for the substitution of H.R. 5773 for S. 728. Unanimous consent was obtained, even from Senator Hayden. 70 Cong. Rec. 67 (1928). Of even greater significance is that Senator Hayden, while urging the adoption of amendments to H.R. 728, said only that the bill was silent on the subject of how much land in private ownership might be irrigated. 69 Cong. Rec. 7634. He did not

state that the reclamation law was inapplicable under S. 728. He had only "expressed doubt as to whether the committee amendments actually accomplished that fact". 69 Cong. Rec. 9451.

When the House took up the Senate amendments to H.R. 5773, Congressman Swing took the floor to explain the Senate amendments. 70 Cong. Rec. 830-31. He made no reference to the deletion of § 1 from H.R. 5773 and no one in the House, either proponents or opponents of the reclamation law, referred to the alleged deletion of the 160-acre limitation from the House bill by the Senate. 70 Cong. Rec. 830-37. The changes made by the Senate, as summarized by Congressman Swing, related to separating the All-American Canal from the rest of the project for purposes of allocating costs and determining repayment; increasing the appropriation for the project; segregating the cost for flood control and providing for repayment of that cost; altering the means for resolving the appropriations of water among the seven basin states under the Colorado River Compact, including the provision that California could obtain no more than 4.4 million acre feet of water a year from the amount appropriated to the Lower Basin; the authorization for a tri-state agreement between Arizona, Nevada and California; and the continuation of the embargo on issuing licenses on the Colorado River. 70 Cong. Rec. 831.

D. Sections 1 and 4(b) did not change the scope of § 14.

Landowners tell us that the "legislative history" of the evolution of §§ 1 and 4(b) confirms that the references to reclamation law contained in these sections were simply intended to specify the financial terms for repayment, and had nothing to do with acreage limitation. L.Br. 51. There is no incompatibility between §§ 1 and 4(b) on the one hand, and the application of § 46 on the other. Both § 1

and § 4(b) refer to some of the financial aspects of the Project Act. Deletion of Senator Pittman's proposed amendment to § 4(b) to require the Secretary to make provision for the delivery of water in accordance with the Reclamation Act is insignificant. It is noteworthy what except for the few lines in the Congressional Record concerning Senator Pittman's proposed amendment, the record is silent as to any detailed consideration of it. It was never called up for debate.

III. THE ADMINISTRATIVE PRACTICE DOES NOT OUST THE COURTS OF JURISDICTION TO DECIDE HIS CASE ON ITS MERITS.

Petitioners contend that the government's failure to enforce the law entitles the excess landowners of the Imperial Valley to receive the water subsidy until the end of time. The implications of petitioners' contention are far reaching. Moreover, their reasoning, if upheld, would allow the inconsistent administrative interpretations in the Imperial and Coachella Valleys to continue in perpetuity. The significance of nonenforcement of the reclamation law was recognized long ago by Professor Taylor:

> The benefits of administrative nonenforcement were realized by opponents of the excess land law on some older projects such as Salt River Valley, Arizona, and the Imperial Valley Division of the All-American Canal. Once nonenforcement had been achieved, they advertised it repeatedly as a sort of "precedent", arguing from it that there should be no law at all. *Taylor, The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 503.

Both the district court and the court of appeals rejected the suggestion that the courts were ousted from their constitutional function of interpreting our laws because of the Wilbur letter. The district court said: "If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law." 322 F. Supp. at 16. The court of appeals considered it to be a "rather simplistic analysis not contained in a formal opinion" and "an informal opinion reached under circumstances indicating a lack of careful consideration". 559 F.2d at 539. The panel rejected the efforts of petitioners to elevate the legal conclusions of the Wilbur letter into the binding force of law. *Ibid.*

The court of appeals carefully analyzed the administrative practice of the Department of Interior. 559 F.2d at 536-40. It found that the only legal analysis of the Department of Interior supporting petitioners' contention was the two and one-half page informal Wilbur letter itself. The Department of Interior began to have its own doubts about the letter's conclusions shortly after water deliveries began in the 1940's, but "continued to adhere to the practice of non-enforcement of acreage limitations in the Imperial Valley because of its previous practice of non-enforcement" until the legal validity of the conclusions in the Wilbur letter were specifically rejected and "thorough and comprehensive opinion by Solicitor Frank J. Barry . . . prepared in response to Congressional inquiries in 1961 and 1964". *Id.* at 539. The court declined to defer this type of administrative practice:

> It is true that in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first on the Wilbur letter, which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter, but instead decided against non-enforcement of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction can not be elevated

into an administrative determination to which the courts should defer. 559 F.2d at 540.[148]

The District attacks the court of appeals for its "ludicrous" conclusion that the Wilbur letter was erroneous. Dist. Br. 58. Yet the District does not make any effort to refute the court's characterization of the letter as a "rather simplistic analysis". Instead, the District's argument actually confirms the view of the panel, for it completely fails to cite any significant legal analysis of the underlying substantive issue supporting the letter and simply recites a number of incidents of non-enforcement. The District's reliance upon the unquestioned principles in this Court's opinion in *United States v. Northern Pacific Railway Co.*, 242 U.S. 190, 195 (1916), that our government should be one "of written laws rather than one of official grace" (Dist. Br. 59) does not support petitioners, but succinctly summarizes the entire thrust of the court of appeals decision.

Rather than defending the Wilbur letter on its merits, the District attempts to sidestep its shortcomings as analyzed both by the court of appeals and Solicitor Barry, by its reliance on an out-dated regulation which is inapplicable by its plain terms. The District claims that Secretary Wilbur was required to rule as he did (and presumably without the necessity of obtaining an opinion from his Solicitor), by reason of the Department of Interior's 1910 regulation found in 43 C.F.R. § 230.70. Dist.Br. 66-67. The landowners are less emphatic and do not argue that the regulation has the effect of law. L.Br. 34.

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[148]The panel's determination was based upon rulings of this Court holding that administrative practice contrary to the law may be overturned no matter how long standing. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325 (1957); *United States v. E.I. duPont deNemours & Co.*, 353 U.S. 586 (1957).

The very language of the regulation itself provides that a vested water-right *may* be recognized "under appropriate regulations and charges". There is no evidence in the record that the government ever adopted any regulations or charges under this regulation concerning the Imperial Irrigation District. In fact, § 1 of the Project Act specifically provides that there was to be no charge for water in the Imperial and Coachella Valleys.

More importantly, the 1910 regulation has no relationship to reclamation projects authorized after enactment of Omnibus Adjustment Act of 1926. Where applicable, it applies solely to the water-right application system first established under the 1902 Act, later made optional by the Irrigation District and Farm Loan Act of May 15, 1922, 42 Stat. 541, 43 U.S.C. § 511, and finally superseded as to future projects by § 46 of the 1926 Act. The latter provided a mandatory form of joint liability repayment contract provided for in the Project Act and other subsequent federal reclamation projects.

The legal reasoning and substantive conclusion of the Wilbur letter was rejected each and every time it was considered by legal officials in the Interior Department. (Solicitors Harper and Barry) and the Justice Department (Solicitor General Rankin). Even Solicitor General Griswold did not indicate he agreed with the Wilbur letter when making his determination not to appeal the decision of the district court against the recommendations of three members of his staff and the Assistant Attorney General of the Lands Division. No official of the government upon whom petitioners rely in their recitation of the administrative history made any effort to provide legal justification for the conclusion of the Wilbur letter.

At trial, Mr. Weinberg, the government's expert witness on the administrative practice of the Reclamation Act,

explained, in careful detail, the erroneous statements of past practices and procedures described by Secretary Wilbur. 2 Tr. 92:18-117:2. Petitioners offered no evidence to refute Mr. Weinberg. The court of appeals reviewed the administrative history and found that the only legal analysis of the Department of Interior which supports petitioners' interpretation of the Project Act is the Wilbur letter itself. 559 F.2d at 539. The administrative practice was not based on any legal analysis, but on previous inaction. 559 F.2d at 540. Petitioners do not point out any error in this conclusion. In fact, Northcutt Ely, while advocating repeal of the 160 acre limitation for the Central Valley Project before a Senate committee eleven years after he assisted in the drafting of the Wilbur letter, testified that the 160 acre limitation simply "has been ignored" in the Imperial Valley. *Hearings on H.R. 3961,* Before Senate Commerce Sub-Comm., 78th Cong., 2d Sess. 632 (1944). A few years later, Mr. Ely recognized the uncertainty in the legal situation when he testified before another committee: "Under the [All] American Canal, there is some question as to what the ultimate solution will be." *Hearings on H.R. 6335,* Before Senate Sub-Comm. on Appropriations, 79th Cong., 2d Sess. 1109 (1946). "Inaction based on previous inaction" (559 F.2d at 540) does not give rise to the estoppel-like results in the cases relied on by petitioners such as *Udall v. Tallman,* 380 U.S. 1 (1965), *Power Reactor Co. v. Electricians,* 367 U.S. 396 (1961) and *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915). The Department of Interior changed its practice in 1964 when Solicitor Barry filed his Opinion. It is clearly the responsibility and obligation of government officials charged with administering the statute to change an earlier erroneous decision or interpretation after full and careful legal examination and analysis. *F.P.C. v. United Elec. Co.,* 381 U.S. 90, 110, n. 30, 113 (1965).

Petitioners attribute a status to an agency's administrative practice never accorded by this Court. While the interpretation given a statute by those charged with its application and enforcement is generally entitled to considerable weight, it hardly is conclusive. *United States v. Missouri P.R. Co.,* 278 U.S. 269, 280 (1929); *County of Marin v. United States,* 356 U.S. 412, 420 (1958). This Court has taken note of the cases relied on by petitioners and observed that departmental construction "is only one in-put in the interpretational equation" and, more importantly, it carries most weight "if such construction enhances the general purposes and policies underlying the legislation". *Zuber v. Allen,* 396 U.S. 168, 192-93 (1969). The 160 acre limitation "is, in every respect, the most important part of reclamation law". Sax, *Federal Reclamation* 2 Waters and Water Rights § 120, p. 200 (1967). This Court has held that the acreage limitation "is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects". *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 291. The mandatory nature of the acreage limitation was recently affirmed and concurred in by all members of the Court. *California v. United States,* 438 U.S. 645, 667 n. 21, 671.

Secretary Wilbur's letter-ruling is in direct conflict with the Congressional mandate and the national policy of the Reclamation Act to create, encourage, and maintain small, family sized farms. An administrative practice can not thwart the plain purpose of a valid law. *United States v. City and County of San Francisco,* 310 U.S. 16, 31-32 (1940). The Wilbur letter, considered hopelessly deficient in every subsequent legal analysis and in direct conflict with the purpose and policy of the Reclamation Act, is not entitled to any deference as a proper construction of the Project Act and reclamation law. *Cf. General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976); *Shea v. Vialpando,*

416 U.S. 251, 262 n. 11 (1974); *Zuber v. Allen, supra,* 396 U.S. at 192-93; *Piper v. Chris-Craft Industries Inc.,* 430 U.S. 1, 41 n. 27 (1977). It is a long and well-established principle, not open to serious dispute, that it is the duty of the courts to rule on the applicable law (*United States v. Des Moines Navigation and R. Company,* 142 U.S. 510, 527 [1892]), and that if a ruling by an administrator is plainly erroneous, it is the duty of the Court to give effect to the will of Congress. *Hewitt v. Schultz,* 180 U.S. 139, 156 (1900). No administrator has authority to repeal an act of Congress. The reasonable basis test of the construction of a statute by an agency, argued so vehemently by petitioners, is not conclusive. Courts are not required to stand aside and rubber stamp administrative decisions deemed inconsistent with a statutory mandate or those which frustrate the congressional policy underlying a statute. *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968).

A. Congressional knowledge does not ratify an erroneous administrative ruling and result in a rewriting of the statute.

Petitioners' contention that Congress ratified the erroneous administrative construction of the Project Act by Secretary Wilbur is based on the erroneous assumption that Congress repeatedly considered and approved Secretary Wilbur's interpretation. This Court has warned that it is a "shaky business" to attribute significance to the inaction of Congress. *Power Reactor Development Co. v. Electricians, supra,* 367 U.S. at 408-09. Petitioners are met at the outset with the fact that this case arose out of the Barry Opinion which was a direct result of an inquiry by Senator Clinton T. Anderson, Chairman of the Senate committee having jurisdiction over the reclamation program. Quite obviously, Senator Anderson did not have the "knowledge" petitioners attribute to Congress. In addition, Senator Kuchel, Senior Senator from California and

a member of the Sub-Committee on Irrigation and Reclamation, was apparently equally ignorant of the state of the law in the Imperial Valley, for it was his pointed questioning which jarred the Solicitor's Office to begin work on their response to Senator Anderson's inquiry. In the congressional hearings collected by the District (Dist. Br. 61-63), Congress did not deal directly and was not directly confronted with the question of applicability of the acreage limitation in the Imperial Valley, with two exceptions: *Acreage Limitations in Bureau of Reclamation Projects,* Hearings Before Sub-Comm. on Public Lands and Resources of Sen. Comm. on Energy and Natural Resources, 96 Cong., 2d Sess., Part 3 (1978) and *Reclamation Reform Act of 1979,* Hearings Before Sub-Comm. on Energy Research and Development of Sen. Comm. on Energy and Natural Resources, 96 Cong., 1st Sess. (1979). In the latter set of hearings, the issue was directly confronted and the Senate thereafter gave petitioners the relief they seek in this Court by amending the Reclamation Act to specifically exempt the Imperial Valley. S. 14, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S-12594 (*daily ed.* Sept. 14, 1979). It is significant that petitioners acknowledged before Congress the need for a specific exemption from the Reclamation Act and addressed their plea to the appropriate forum.

The court of appeals rejected the argument of congressional ratification. 559 F.2d at 540-541. The court observed that many of the references in the committee hearings relied upon petitioners' were brief references to the situation in the Imperial Valley and contained lengthy considerations of completely different reclamation projects. The request for specific exemptions in other areas was attempted by using the Imperial Valley situation to persuade Congress to provide an exemption elsewhere. The court concluded that rejection, or even acceptance of an exemp-

tion claim for another project hardly amounts to deliberate congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley and government reports sent to congressional committees.

The best evidence petitioners can muster on this argument concerns the 1958 hearings before the Sub-Committee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law. *Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448*, Sub-Comm. on Irrig. and Recl. of Sen. Comm. on Interior and Insular Affairs, 85th Cong. 2d Sess. (1958). As the court of appeals noted, the sub-committee was concerned with the future shape of the reclamation law in general and the application of the acreage limitation to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley in the Wilbur letter was brought to the sub-committee's attention by counsel for the District who testified shortly after appearing before the Supreme Court in the *Ivanhoe Irrigation District v. McCracken* litigation. His testimony echoed the theory concerning vested water rights that was ennunciated by the California Supreme Court in the *Ivanhoe* cases and later rejected by this Court. These circumstances cannot amount to congressional ratification by silence with respect to the Wilbur interpretation, and significantly, the Chairman of the Sub-Committee was Senator Anderson, who later initiated the Interior Department's review that culminated in the Barry opinion rejecting the Wilbur interpretation.

Petitioners' reliance on the fact that Congress has made repeated appropriations concerning various aspects of the Project Act is also misplaced, for only recently this Court held that continued appropriations by Congress does not

justify ignoring the ordinary meaning of plain language and cannot be interpreted to mean congressional advice to ignore provisions of the law. *T.V.A v. Hill,* 437 U.S. 153, 173, 189 (1978). To do so would be to foster a repeal by implication which is not favored. *Id.* at 189. Since there is no clear repugnancy between any substantive part of reclamation law and the Project Act or between § 14 and § 6 of the Project Act, it cannot be assumed that members of Congress exhaustively reviewed the background of every authorization before voting on an appropriation. *Id.* at 190. Petitioners' argument presented in this case is virtually identical to that rejected in *T.V.A. v. Hill,* although representative of the view of the minority. *Id.* at 200-02.

Finally, without going into unnecessary detail in this brief on matters amply covered by the court of appeals' opinion, the fact of the matter is that it is hardly likely that Congress knowingly permitted and approved the inconsistent administrative interpretations concerning the Imperial Valley and Coachella Valley. Both valleys are treated identically in the statute. If, in fact, there were any significant differences which warranted different treatment, Congress would have specifically provided for those unusual circumstances at some point during the eight years when the Project Act was under consideration.

IV. NEITHER RES JUDICATA NOR FULL FAITH AND CREDIT BARS RESPONDENTS FROM PURSUING THE APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT.

Subsequent to the decision in *Hewes,* there have been many administrative and judicial determinations under the Reclamation Act of 1902 and its various supplements, including the Project Act. These determinations, described previously throughout this brief, were both consistent with

national reclamation policy and uniformly inconsistent with the superior court judgment and the Wilbur letter from which it drew its inspiration.

Landowners have misstated the record when they report that the contract validated in *Hewes* "accurately expresses the intention of the parties that acreage limitation would not be imposed". L.Br.56. Their reference to the testimony of Mr. Weinberg (3 Tr. 221, 240-41) does not support their claim. Mr. Weinberg testified that the contract contains a reference to the reclamation laws which in turn reflected the intention of the signers of the contract for the United States and the District. He denied that the contract binds the United States to ignore the excess land law requirements. 3 Tr. 241:20-242:5.

Any suggestion that the voters of the Imperial Valley relied on or were misled by the *Hewes* judgment or the Wilbur letter finds no support in the record. The voters of the Imperial Valley voted to affirm the contract 4,947 against 729. LX-BC 14. The election was held January 12, 1933. LX-BC 11. This was almost six months before the superior court judge signed the findings, conclusions and judgment on July 1, 1933. LX-BC 32, Dist.App. 120a, 153a. It is thus readily apparent that the decision of the court of appeals does not "create an entirely different contract" as charged by the landowners. L.Br. 57. It is both inaccurate and misleading for the landowners to infer that a new election of the voters would have been required if reclamation law applied to the contract. L.Br. 63, n.43. Secretary Wilbur did not write his letter until February 24, 1933, 6 weeks after the election was held and *Hewes* was not tried until March 16, 1933 (Dist. App. 121a) and not decided until May 24, 1933. L.Br. 133a. The *Hewes* judgment was not the basis for voting either way on the contract. The contract voted upon and litigated in 1933 is the same contract under consideration before this Court. The application of reclamation law to Project Act has nothing to do with confirming the validity of the contract. The question of rights and duties under the contract was not for the superior court to determine. That question is for this Court to decide, whether it be the government or respondents who frame and present the issue.

The court of appeals decision, if upheld, would have the identical effect on the District and the All-American Canal contract that would have resulted had the government either prevailed at trial or not abandoned the case on appeal. Both the government and respondents sought to have the benefits of the project go to the beneficiaries intended by Congress. No challenge has been made by either the government or respondents to the validity of the contract, the only issue properly decided by the superior court. Pursuing the appeal by respondents has subjected excess landowners of the Imperial Valley to no legal disabilities other than those present when the government was a party. If refusal to consider the *Hewes* case preclusive has an effect on principles of federalism (a contention respondents deny), that effect is no greater than what was to be expected when the government filed suit. The *Hewes* judgment was not binding on the government because of sovereign immunity. It is not binding on respondents for the many reasons which follow.

A. The *Hewes* case was not a true adversary proceeding and its judgment is not entitled to *res judicata* recognition.

Petitioners dispute the panel's decision on the grounds that the ruling on federal reclamation law in the *Hewes* case was not pure dicta but was the very substance of the decision. They attribute the determination concerning the acreage limitation to be of substance because it was put in issue by Malan and therefore properly decided. If peti-

tioners are correct, there would be no limit to the mischief available to parties seeking to frustrate this and other statutes. The court of appeals recognized the danger of a collusive suit when it declined to determine whether or not respondents were interested parties in the *Hewes* litigation so that they would be bound by the decision of the superior court, in view of the fact that neither of the parties litigating that issue wished to see the acreage limitation applied in the Imperial Valley. 559 F.2d at 526, n. 31.

A review of the record of the *Hewes* case shows that there was no true adversity between the District and Malan on the acreage limitation question. Neither party wanted the anti-monopoly provisions of reclamation law to apply. In fact, the District's attorney, Mr. Childers, sought a formal Solicitor's opinion to that effect. Malan did not want to sell his excess lands. Both were satisfied with the superior court's judgment and Malan did not pursue his appeal. The record shows that the District and the government were anxious to start construction of the All-American Canal and the Comptroller General would not appropriate the first installment of $6,000,000 to begin construction of the All-American Canal until the confirmation of the contract was final. There is no reference in any of the government records following the rendition of the judgment in *Hewes* that anyone gave any consideration to the acreage limitation question decided in that case. LX-BH, BI, BJ, BL. Malan's attorney provided a copy of his appellate brief to Secretary Ickes. LX-BK. Reference to the reclamation law was one small part of a shot-gun blast in Malan's brief at the alleged invalidity of the contract. *Id.* at 18-19. There is no indication that the Secretary saw the correspondence from Malan's attorney and it was routinely referred to the District Counsel of the Bureau in Los Angeles. *Id.*, 3rd unnumbered page. The record does not show why Malan dismissed his appeal, but it takes little

imagination to realize that his interest and that of the District were identical in their desire to have a determination that the acreage limitation not be applicable to the contract.

The inference to be drawn from all the surrounding circumstances (Mr. Childer's request for a Solicitor's opinion, Executive Assistant Ely's change of opinion concerning the applicability of the acreage limitation, Assistant Commissioner Dent's new revelation about "vested rights", the hurried preparation of the Wilbur letter without study or a Solicitor's Opinion and the dismissal of Malan's appeal) is that the parties sought to obtain a binding opinion on the Project Act to foreclose a full examination of the underlying legal issue. The federal courts are not required to follow non-adversary decisions of either federal or state courts. *Aerojet General Corporation v. Askew,* 511 F.2d 710, 720-21 (5th Cir. 1975) *reh. den.,* 514 F.2d 1072 (1975), *cert. denied,* 423 U.S. 908 (1975). *Cf. Lord v. Veazie,* 49 U.S. (8 How.) 251, 255-56 (1850); *United States v. Johnson,* 319 U.S. 302 (1943); *Chicago and G.T. Ry. Co. v. Wellman,* 143 U.S. 339, 344-45 (1892); *Chamberlain v. Cleveland,* 66 U.S. 419 (1862). To do so would pose a grave risk of violating due process. *Cf. Hansberry v. Lee,* 311 U.S. 32 (1940).

B. Congress did not intend confirmation proceedings to be a vehicle for obtaining judicial determinations on federal reclamation law.

Respondent's agree with petitioners that it is the congressional purpose behind the reclamation law which governs the determination of the precise issues to be decided by a state court in confirmation proceedings. L.Br. 57; Dist.Br. 15-16. Examination of the legislative history behind the adoption of the 1922 Act, 430 U.S.C. § 511, leads to the identical conclusion reached by the court of appeals

in the case at bench that the *Hewes* decision on the acreage limitation was dicta. By adopting the arguments of petitioners that the *in rem* confirmation proceedings in 1933 constituted a bar to intervention, the district court chose to attribute significance to those proceedings never intended by Congress. To understand the purpose of the confirmation proceedings, it is necessary to carefully review the statutory requirement of the confirmation proceedings in the historic context of the Project Act.

As originally envisioned in the Reclamation Act of 1902, the Secretary, in providing for repayment of project costs by those receiving the benefits of an irrigation project, contracted directly with individual landowners.[149] In 1922, however, the Secretary was authorized to contract for repayment with irrigation districts, with a proviso that "no contract with an irrigation district * * * shall be binding on the United States until the proceedings on the part of the district or the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction * * *."[150] This requirement was carried forward into § 46 of the Omnibus Adjustment Act of 1926 which prohibits delivery of water from reclamation projects until an irrigation district has executed a contract for repayment of construction costs, providing for acreage limitation and "the execution of such contract * * * shall have been confirmed by a decree of a court of competent jurisdiction." Following the established pattern of reclamation law for recouping costs for reclamation projects, § 4(b) of the Project Act directed the Secretary of the Interior to "make provisions for revenue, by contract or otherwise [for] payment of all expenses of construction, operation and maintenance of said [All-American] canal and

[149]Act of June 17, 1902, 32 Stat. 389, 43 U.S.C. § 431.
[150]43 Stat. 541, 43 U.S.C. § 511.

appurtenant structures in the manner provided in reclamation laws."[151] It was pursuant to the above provision that the proceedings to confirm the All-American Canal contract, *Hewes v. All Persons*, were initiated. The United States was neither named nor served in the state action and was not a party to that proceeding. The United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Accordingly, the United States is not bound by the *Hewes* decision.

The requirement of court confirmation proceedings first appeared in the Act of May 15, 1922.[152] The purpose of this legislation was to provide a vehicle whereby the United States could forego its repayment contracts with individual landowners in irrigation projects and, in lieu thereof, accept the obligations of irrigation districts organized under state law. As stated in the report on the bill in the House (H.R. 4382):

> The purpose of this bill is to enable the owners, entrymen, and occupants of lands under Government constructed and operated irrigation projects to form irrigation districts under the State law of the State wherein the irrigated lands are located, and when formed in accordance with the State law they shall be recognized as a public corporation * * *. And any lien the Government may have for moneys expended in the procuring of water for the acreage in the district to the individual owner of lands under such ditch or works constructed by the Government is released and passes by virtue of this act to the district body as a whole and is cared for by district assessment and levy, which assessment so levied is chargeable and recovered against the land of the individual owner as debtor. In other words, the Federal Government is dealing with the irrigation district instead of the individual owner or water users' association.
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> * * * * *

[151]45 Stat. 1058, U.S.C. § 617c(b).
[152]43 Stat. 541, 43 U.S.C. § 511.

The general advantages of this proposed legislation may be briefly stated as follows:

* * * * *

13. The laws of all States provide for confirmation proceedings, jurisdiction over all persons being secured by publication, whereby the decree becomes conclusive upon all the world *as to the organization of the district and the validity of the debts incurred.* (Emphasis added.)

* * * * *

17. Where irrigation districts are formed and assume the indebtedness to private creditors or the United States, the liens for construction costs, etc., may be discharged as regards private lands. Then, after the district makes the necessary collections by assessment and levy, as in the case of other municipal corporations, and the only lien required is that which comes into existence annually for the current assessment, such an obligation and lien are not in any sense a legal bar to the enjoyment of the privileges of the Federal farm loan act.[153]

The debates on H.R. 4382 on the floor of the House demonstrate the intention of Congress to remove the lien of the United States upon individual landowners and shift the burden to the districts organized under state law. The only references in the debates to the confirmation proceedings were concerned with whether the confirmation decree would fully secure the lien of the United States. For example, Congressman Kinkaid, sponsor of the bill, offered the following explanation:

> Mr. Kinkaid. * * *
>
> The bill further provides that no contract with an irrigation district shall be binding until the proceedings organizing the district and contracting therewith shall be confirmed by a court of competent jurisdiction. And it further provides that after such confirmation it will be further necessary for the water users in each case, or the owner of the farm unit in each case, to contract in writing with the Secretary of the Interior that he will be bound by the new arrangement and will pay his proportionate share. The bill further requires that before the individual water user's lands are released from liability the Secretary of the Interior shall find that the proceedings are correct; that the district is formed in accordance with the laws of the State in which the district is situated, and that the contract binds the district fully for the liability of the payment of all the construction charges, which liability hitherto rested upon the separate farm units.
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> * * * * *
>
> Mr. Sanders of Indiana. This proviso seems to contemplate that *the authorization of the execution of a contract* shall be brought in question in some way and decided by a court. (Emphasis supplied.)[154]

Congressman Leatherwood explained the adequacy of the provisions for securing payment of project costs to the United States as follows:[155]

> It is specifically provided that before the Secretary of the Interior shall approve any contract or accept any obligation under the terms of the bill that it shall be made to appear that *a court of competent jurisdiction has passed upon the question of organization of the district and has rendered its solemn decree that all preliminary acts have been done as required by law* and that all things necessary to validate the contract have been done. In other words, you get just such a decree protecting the Government as is had in most cases before investments are made in municipal bonds. (Emphasis added.)[156]

[153] H.R. Rep. No. 662, 67th Cong., 2d Sess. 2 (1922).

[154] 62 Cong.Rec. 3573-74 (1922).

[155] 62 Cong.Rec. 3579-80 (1922).

[156] There were like comments on a similar proposal introduced in the same Congress. *See Hearings on H.R. 2702*, House Comm. on Irr. of Arid Lands, 66 Cong. 2d Sess. (1921); H.R. Rep. No. 1065, 66 Cong., 2d Sess. (1921).

The 1922 legislation only *authorized* the Secretary to contract with irrigation districts. In 1926, the procedure was revised and set out in § 46 *requiring* the execution of a contract with an irrigation district before the United States could deliver any water of a reclamation project, and the language requiring confirmation was condensed to its present form. There is no indication, however, that any change in meaning was intended; in fact, the legislative history of the 1926 Act contains no discussion of the confirmation provision.

Nothing in the legislative history of any part of the reclamation law suggests that Congress expected reclamation law issues to be litigated and determined when a contract was judicially validated.

C. California Law Does Not Authorize The Examination of Federal Reclamation Law In Confirmation Proceedings.

Confirmation proceedings have long been authorized by state law in California, but even under state law it has been recognized that their only purpose is to determine the status of the district (i.e., to obtain a decree that the statutory requirements for organization have been met) and its powers to do certain acts, such as to issue bonds. The original California Statute authorizing the organization of irrigation districts is known as the Wright Act, 1887 Cal.Stat. 29. Under this legislation, the board of directors of an irrigation district was authorized to "execute all necessary contracts" § 11 at 34. There was no reference to confirmation proceedings relating to contracts, but the board was given the discretion to call for elections in the case of special assessments levied to raise money. § 41 at 44.

The Wright Act was amended in 1889. 1889 Cal.Stat. 212. The amended statute again made no reference to

confirmation proceedings for contracts, but authorized the board of directors to commence a special proceeding in the superior court praying that the proposed authorization and sale of bonds "be examined, approved and confirmed by the Court".

In 1897 the California legislature adopted yet another statute for the organization and government of irrigation districts and provided authority for the acquisition of or contracting for irrigation facilities and the distribution of water. 1897 Cal.Stat. 254. The board of directors was required to call an election of its landowners to approve the issuance of bonds. § 30 at 263-64. Thereafter, either the board of directors or an assessment-payer of a district could bring an *in rem* action in the superior court to determine "the validity of any bonds or assessments". § 68 at 276. Section 68 is reproduced in L.App. 166a.

In 1917, the legislature adopted the Irrigation District Federal Cooperation Law, 1917 Cal.Stat. 160 (codified in 1943 as Cal. Water Code § 23175 [West]), providing that any proposed contract with the United States be submitted to the electors of the district in accordance with § 30 of the 1897 Act. It was optional with the board of directors to submit the contract to the superior court "to determine the validity thereof and the authority of the board to enter into such contract". § 3 at 245. Recognizing that there may be a conflict between the rights of landowners in an irrigation district and requirements of federal reclamation law, § 4 of the 1917 Act provided that federal law would prevail.[157]

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[157] "Sec. 4. All water, the right to the use of which is acquired by the district under any contract with the United States shall be distributed and apportioned by the district in accordance with the acts of congress applicable thereto, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of said contract, and provision may be made in the contract between the district and the United States for the refusal of water service to

The early California legislation expressly described the limited purpose of confirmation proceedings and the state courts have recognized that limited purpose. In *Crall v. Board of Directors of Poso Irrigation Dist.*, 87 Cal. 140, 146, 26 P. 797, 798 (1890), the court held that confirmation proceedings concerning the issuance of bonds were for the purpose of determining "the status of the district and its power to issue valid bonds". In *Rialto Irrigation Dist. v. Brandon*, 103 Cal. 384, 386-87, 37 P. 484, 485 (1894), the court characterized confirmation proceedings concerning a bond issue as being "authorized for the express purpose of fixing the legal status of the corporation [i.e., the irrigation district] . . ."

These permissive California statutes fall far short of the "elaborate procedures" alluded to by the landowners. (L.Br. 57) and the exclusive jurisdiction suggested by the District by its reference to *City of Tacoma v. Taxpayers,* 357 U.S. 320 (1958). Dist.Br. 72. As codified in § 23225 of the California Water Code, validation proceedings continue to be discretionary, not mandatory, with irrigation districts.[158] The California legislature did not in

any or all lands which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract between the district and the United States." This section is now codified in Cal. Water Code § 23200 (West).

[158]The 1917 Act was the applicable statute in 1933 when the *Hewes* proceeding took place. In 1943, the California legislature codified authorization for validation proceedings in Cal. Water Code § 23225 (West). "Validation proceedings. A district may submit any contract or proposed contract and bond issue to the superior court of the county in which is situated the office of the board to determine the validity thereof, the authority of the district to make the contract, and the authority for and the validity of the issuance or transfer of the bond. The validation proceedings shall be had as in the ordinary case of the judicial determination of the validity of district bonds and with like effect." In 1961, § 23225 was amended to read: "An action to determine the validity of any contract and bonds may be brought pursuant to Chapter 9 (Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." Code Civ. Proc. § 860 (West) provides: "Authority of public agency;

any way indicate an intention to allow those proceedings to nullify an existing law of the United States, and the state court's attempt in *Hewes* to interpret the contract and adjudicate the rights of the United States as well as present and future beneficiaries under the contract in their absence, went beyond the authority of the court.

The California Supreme Court is in complete accord with the statutory scheme and its earlier decisions. Justice Peters' opinion in *Ivanhoe,* following remand from this Court, explicitly stated that ". . . the only issue involved [in a confirmation proceeding in addition to the District's capacity to contract] is the validity of the contract". *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 699, 3 Cal.Rptr. 317, 320, 350 P.2d 69, 72 (1960). Landowners emphasize that the *Ivanhoe* proceeding is one where both the California Supreme Court and this Court recognized the propriety of considering the issue of the acreage limitation. L.Br. 59. Landowners' emphasis is misplaced, for Justice Peters addressed that precise point after the state court's earlier decision had been reversed.

> The duty of the trial court was to determine whether or not the contract was valid and entitled to confirmation. *It was not to determine what the various parties claimed were their rights and duties under the contract.* Such claims could be settled only by adjudication between the parties themselves. Thus the claims of parties, especially parties not before the court, were irrelevant. 53 Cal.2d at 727-28, 3 Cal.Rptr. at 338, 350 P.2d at 90. (Emphasis added)

time for proceedings; venue; nature of action. A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this and for sixty days thereafter bring an action in the Superior Court of the County in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

The second California *Ivanhoe* decision was unanimous and recognized its previous mistaken foray into unauthorized territory.

The status of irrelevant matter decided by the Imperial County Superior Court is no greater than that accorded by California's appellate courts. Full faith and credit calls for the same respect, not the additional respect in the federal courts sought by petitioners.

The efforts of landowners to find support in *California v. United States,* 438 U.S. 645, 675 (1978) for an elusive congressional purpose in the reclamation law of deferring to both the substance and form of state water law does not assist them in this dispute. L.Br. 58. The principles of comity and federalism are not in conflict in the present case because the Ninth Circuit's treatment of the *Hewes'* judgment is consistent with both California law and the federal interest in implementation of national reclamation policy. If there is any relevance in this Court's opinion to the present dispute, it is found at 438 U.S. 668-69, n. 21, where the 160-acre limitation set out in § 5 of the 1902 Act is recognized as a specific, congressional directive to the Secretary prevailing over any deference to be accorded state law.[159]

[159]Landowners' reliance upon other state court confirmation proceedings to support their contention that there is authority to determine federal reclamation law is mistaken. L.Br. 59. *In re Owl Creek Irr. Dist.,* 71 Wyo. 30, 253 P.2d 867, *on pet. for reh.,* 258 P.2d 220 (1963) was a petition to both enlarge the borders of an irrigation district and to confirm a contract between the irrigation district and the United States providing for recordable contracts to carry out the 160-acre limitation. The contract was held to be invalid under state law. The commissioners of the irrigation district were found not to have authority to enlarge the boundaries of an irrigation district and make the new landowners subject to federal reclamation law. There was no attempt to interpret federal law. In *McLean v. Truckee—Carson Irr. Dist.,* 49 Nev. 278, 292, 245 Pac. 285, 289 (1926), the Nevada Supreme Court made it clear that it did not have the authority to interpret federal law and was simply concerned with determining the validity of the contract and the authority of the irrigation district to enter into it.

> "We are not concerned with the question raised as to the construction of the proposed contract or its enforceability in its present form. The question put to the lower court was whether the contract was valid and such as the board of directors of the district were authorized to enter into." 49 Nev. at 292, 245 P. at 289.

The other authorities cited by the landowners similarly rejected their contentions made in this Court. *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 P. 663 (1913) was decided in a manner at odds with the broad scope of jurisdiction asserted by petitioners. The irrigation district sought a determination that it was legally organized in accordance with state law, the proceedings of the district leading up to and authorizing issuance of bonds were valid in accord with state law, and execution of a contract with the United States was in harmony with reclamation law. The court concluded that the district had the power and authority to enter into a binding agreement. The references to reclamation law mean simply that "the Secretary had the power to enter into such a contract under the provisions of the act of June 17, 1902, known as the 'Reclamation Act' ". 131 P. at 664. This was the identical interpretation of an earlier Idaho case also relied upon by landowners, *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 P. 382, 383 (1913).

D. *Res Judicata* is not an inflexible rule and does not apply in cases involving important considerations of policy where its application would defeat the ends of justice.

The doctrine of *res judicata* has never been applied in the rigid and inflexible fashion urged by petitioners in a case involving important considerations of policy where to do so would be contrary to the interests of justice. The district judge recognized that the determination of the applicability of reclamation law in the Imperial Valley involves "important considerations of national policy". 322 F.Supp. at 16. The court of appeals did not find it necessary to consider whether or not important policy considerations mandate the inapplicability of *res judicata* principles in litigation concerning the acreage limitation question. 559 F.2d at 526 n. 31.

There can be no justification for allowing a non-adversary state trial court decision to have the conclusive effect urged by petitioners. Water in the arid regions of the Western states is often referred to as "liquid gold." Without it, farmers in desert areas like the Imperial Valley could grow nothing, no matter how much they spent on improvements. There was no finding by the district court of detrimental reliance by anyone on the *Hewes* decision or the Wilbur letter. Neither the government nor respondents have demanded that the excess landowners return the incalculable benefits provided to them the past four decades which were intended for others.

The subsidy in the case at bar is a recurring one and, if petitioners prevail, the handful of large landowners whose petitions are before this Court will retain the irrigation benefits in perpetuity. The 160 acre limitation involves important considerations of national policy. It is this Court, not the Imperial County Superior Court, that is charged with determining the identities of the individuals upon whom Congress intended to bestow this vast and virtually unlimited federal subsidy. The congressional purpose has been expressed, time and time again, to dispense the water subsidy for the exclusive benefit of family sized farms. The Court accorded recognition to this policy in clear and unmistakable language in its *Ivanhoe* opinion, when Justice Clark speaking for a unanimous Court, said:

> From the beginning of the Federal Reclamation Program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the greatest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water. See Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale Law Journal, 477. 357 U.S. at 292.

The attempted application of *res judicata* in the present case presents unique circumstances and the issue arises only because the government failed to appeal. Its application would result in completely frustrating national reclamation policy, for petitioners cannot seriously contend that the Reclamation Act was designed for the large landowners of the Imperial Valley but for family sized farms elsewhere in the 17 Western reclamation states. As the authorities hereafter cited demonstrate, the courts have declined to apply *res judicata* in circumstances where it application would defeat the ends of justice.

Both federal and state courts recognize an exception to *res judicata*, as does the proposed revision of the Restatement, where warranted by the interests of justice. The authorities have blurred the distinction between *res judicata* and its sister doctrine of collateral estoppel. Whatever those distinctions may have been in the past, the near impossibility of carefully separating their respective interests and principles has been recognized by the latest proposed draft of the Restatement which treats them as "direct estoppel" and "collateral estoppel". Restatement of Judgments (Second) § 68b, Tentative Draft No. 4 (1977).

This Court has recognized the general rule of finality of jurisdictional determinations to be subject to exceptions. *Durfee v. Duke*, 375 U.S. 106, 114-115 (1963). Other courts have determined that general principles of equity will not be applied to frustrate the purpose of law or to thwart public policy. *United States v. Pan American Petroleum Co.*, 55 F.2d 753, 776 (9th Cir. 1932) *cert denied*, 287 U.S. 612; *White v. Adler*, 289 N.Y. 34, 43 N.E.2d 798, 803 (1942). The Court follows the general rule where there has been

an intervening decision or change in the law after the initial judgment. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945); *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). In recognition of the profound public importance of the reclamation program in the West, the Ninth Circuit has adopted a flexible approach to *res judicata* and has reconsidered an earlier decision where the precise question of law was determined. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1094-1098.

> Nevertheless, in view of the importance of the question, and the opportunity this case has given to examine it more fully, we have considered the legislative history of the Flood Control Act of 1944 at some length. *Id.*, 535 F.2d at 1098.

One commentator observed that exceptions to the hard rules on *res judicata* represent

> an enforced tribute to human reluctance to let controversial issues stay settled. Laymen more than lawyers, and lawyers perhaps more than judges, but even judges to some extent, are moved by the appeal of afterthought and afterdiscovery. It is indeed a problem to set acceptable boundary lines between the normal and very necessary rule of repose and the scattering concessions to people with hard cases. Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation.* 48 Harv.L.Rev. 1281, 1331 (1935).

The tentative draft of the Restatement is in complete accord for it recognizes an exception to the general rule of preclusion where:

> (b) The issue is one of law and . . . (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

> (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts . . . or
>
> * * *
>
> (e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, . . . *Restatement Judgments, supra,* § 68.1.

The Restatement is in accord with the prevailing view of the courts.[160]

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[160] "[R]es judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies" *Spilker v. Hankin*, 188 F.2d 35, 39 (D.C. Cir. 1951). See also *Burns Bros. v. Central R.R.*, 202 F.2d 910 (2d Cir. 1953) (at the time of the first action, only one of two remedies was available); *United States v. Pan American Petroleum Co.*, 55 F.2d 753, 782 (9th Cir. 1932), *cert. denied*, 287 U.S. 612 (special interest of the government); *Creek Nation v. United States*, 168 Ct.Cl. 483 (1964) (a change in the law); *Light v. Adler*, 289 N.Y. 34, 43 N.E.2d 798 (1942) (splitting a cause of action as a result of defendant's conduct); *State ex rel. Light Pine Sash Co. v. Superior Ct.*, 145 Wash. 576, 261 P. 110, 111 (1927) (public policy and little inconvenience to defendant). The doctrine of *res judicata* is not to be used in circumstances which would violate principles of public policy or submerge the plan of Congress for the administration and enforcement of its policy. *Denver Bldg. and Const. Tr.C. v. NLRB*, 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951); *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013.

Other courts have refused to apply traditional *res judicata* rules when to do so would be unfair or unjust. *Adams v. Pearson*, 411 Ill. 431, 104 N.E.2d 267 (1952); *Flanagan v. Flanagan*, 73 N.Y.S.2d 267 (Sup. Ct. 1947), *modified*, 273 App. Div. 918, 77 N.Y.S.2d 682 (1948), *aff'd*, 298 N.Y. 787, 83 N.E.2d 473 (1948). Both collateral estoppel and *res judicata* are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. *Tipler v. E. I. duPont de Nemours and Co.*, 443 F.2d 125 (6th Cir. 1971); *Application of Fried*, 312 F.2d 930, 931 (Court of Customs & Patent Appeals, 1963); *United States v. Frew*, 187 F.Supp. 500, 506 (E.D. Mich. 1960) (criminal prosecution for sending obscene matter through the mails); *Yates v. United States*, 354 U.S. 298, 336 (1957) (conspiring to overthrow the Government

The California Supreme Court follows a similar flexible rule:

> That principle [of *res judicata*] is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy, . . . *Guardianship of DiCarlo,* 3 Cal.2d 225, 235, 44 P.2d 562, 99 A.L.R. 990 (1935). *Accord, Greenfield v. Mather,* 32 Cal.2d 23, 35, 194 P.2d 1, 8 (1948).

Although a subsequent change in the law, standing alone, may not justify an exception to according *res judicata* effect to a prior judgment between the identical parties in California (*Slater v. Blackwood,* 15 Cal.3d 791, 796, 126 Cal.Rptr. 225, 228, 543 P.2d 593 [1975]), preclusion will not be applied to foreclose relitigation of an issue concerning a public agency's ongoing obligation to administer a statute enacted for the public benefit affecting members of the public not before the court. *Chern v. Bank of America,* 15 Cal.3d 866, 872, 127 Cal.Rptr. 110, 113, 544 P.2d 1310, 1313 (1976); *Louis Stores Inc. v. Department of Alcoholic Beverage Control,* 57 Cal.2d 749, 757-58, 22 Cal.Rptr. 14, 18, 371 P.2d 758, 762 (1962); *California Optometric Assn. v. Lackner,* 60 Cal.App.3d 500, 505, 131 Cal.Rptr. 744, 747 (1976). Even if all elements of *res judicata* are present, the court is empowered to refuse to apply the doctrine "to prevent defeat of the ends of justice". *In re Marriage of Hight,* 67 Cal.App.3d 498, 503, 136 Cal.Rptr. 685, 687 (1977). It has not been applied if there was not a "fair opportunity to litigate" (*Id.,* 67 Cal.App.3d at 503, 136 Cal.Rptr. at 687), and if the party sought to be precluded did not "participate in the control of the action and if the judgment is adverse, be able to determine whether or not an appeal should be taken", for being a nominal party is insufficient. *Id.,* 3

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and violating the Smith Act); *Powers v. Floersheim,* 256 Cal.App.2d 223, 230, 63 Cal.Rptr. 913 (1967) *cert. denied,* 391 U.S. 951 (action to enjoin parties from engaging in business as a collection agency without a license).

Cal.App.3d at 504, 136 Cal.Rptr. at 688. Finally, the parameters of the exception are to be determined by the "quality and intensity of the public interest involved" in determining if there should be a reexamination of the issues. *Chern v. Bank of America, supra,* 15 Cal.3d at 873, 127 Cal.Rptr. at 114, 544 P.2d at 1314.

The acreage limitation question need not have been considered by the superior court in *Hewes.* The only questions for determination were the status of the District and the validity of the contract. The government was desirous of having the contract confirmed so that the validity of the contract would not be raised at a later time and make it impossible for the District to meet its financial obligations on repayment. The contract was determined to be valid and no party in this or any other forum have ever asserted that the contract is invalid. The courts of the State of California recognize that irrelevant matters decided in prior litigation do not have preclusive effect in later litigation. The manifest importance of the acreage limitation issue militates against deciding this case on a technicality raised only because the government failed to appeal the judgment of the district court.

V. RESPONDENTS HAVE AN APPEALABLE INTEREST IN PURSUING THE JUDGMENT OF THE DISTRICT COURT.

Respondents are 123 residents of the Imperial Valley who want to buy some of the excess lands owned by the landowner petitioners at below market prices as mandated by § 46. The respondents had appeared in this case in the role of an *amicus curiae.* When the government failed to appeal the judgment of the district court, they moved to intervene for purposes of pursuing the appeal in order to

protect their interest in having the excess lands sold under recordable contract as provided in § 46. The court of appeals concluded that respondents met the requirements of standing so as to have an appealable interest in pursuing the judgment. Petitioners, who understandably would prefer to have this case decided on the jurisdictional issue alone without reaching the merits, challenge respondents' appealable interest alone. They raise no question about the other aspects of Rule 24, Fed.R.Civ.P.

Petitioners' attack is characterized by an almost total failure to recognize the unique features of § 46. The record developed at trial, along with the current administrative practice of the Interior Department establish that respondents' injury, their inability to buy excess lands at below market prices, is almost certain to be remedied when the landowner-petitioners execute recordable contracts in compliance with § 46.

A. The district court decision on the merits would have become a bar to respondents if it became final.

The judgment of the district court would have forever barred respondents from having an opportunity to purchase excess lands in the Imperial Valley at below market prices if they had not intervened when the government failed to appeal. This bar is recognized by the District, for it urges this Court to vacate the decision of the court of appeals in order to leave the judgment of the district court "intact as *res judicata*". Dist.Br. 85. Intervenors, such as respondents, have an interest in appealing from a judgment where necessary to avoid the *res judicata* effect of the judgment and to protect their direct and substantial interest in the outcome of the case. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 281-83 (1946); *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 83 (1958). This interest may be pursued, even where one of the original parties does

not appeal the adverse decision of the lower court. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525 n. 4 (1949).

B. Respondents meet the constitutional test of standing because execution of recordable contracts will redress their inability to buy excess lands at below market prices.

This Court recently had occasion to explain the applicable principles in making a determination of a party's standing. Mr. Chief Justice Burger's opinion in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978) stated it this way:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assume that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the Plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 261 (1977). See also *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

If the decision of the court of appeals is affirmed, approximately 265,000 acres of excess lands will be sold under the price control restrictions of § 46 at below market prices. This result is a certainty mandated by § 46 and will make many family-sized farms available for purchase in the Imperial Valley at prices which do not include the incremental value brought about by the Project Act. Without

the project, the land would be desert and almost worthless.[161] In reaching its conclusion that respondents had the requisite standing to pursue the appeal, the Ninth Circuit pointedly observed:

> This injury (the payment of prices higher than they would have to pay for farm land if § 46 applied to the private landowners in the Imperial Valley) stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices.
>
> Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued . . . . Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price. 559 F.2d at 522.

Petitioners are overly pessimistic about respondents' purported inability to purchase the excess lands, no matter what the selling price may be. Respondents were not required to establish with absolute certainty that they would be able to purchase the excess lands, for this Court noted in *Arlington Heights* that the requested injunctive relief there "would not guarantee that the project would be built" because the builder would still have to secure financing, qualify for federal subsidies and carry through with construction. 429 U.S. at 261. In the case at bench, as much as one hundred percent financing is available from the

[161] Report of Special Master 15; 1 CR 169, 170, Con. App. 324a; 4 Tr. 351-16, 388, 22-25, 423:23-25.

Farmers Home Administration for the purchase of farms and equipment.[162]

Respondents were not required to establish themselves as pillars of the financial community, having either the requisite capital or borrowing power to enable them to purchase the excess lands, as suggested by landowners (L.Br. 67), any more than the individual plaintiff in *Arlington Heights* was required to establish his ability to pay the rent in the proposed housing development. Since the record is uncontradicted from the Yellen affidavit that the ex-contract market value of farm land in the Imperial Valley was approximately $25 to $50 per acre at the time respondents sought leave to intervene, while irrigated lands had a value of between $1,200 to $1,400 per acre, it is unlikely that respondents would have any difficulty obtaining sufficient funds either through private or government lending sources.

Arguably, the purchase of farms, as with housing developments, is subject to similar uncertainties, a factor recognized by the Court in *Arlington Heights*. In *Arlington*

[162] The Farmers Home Administration is an agency of the government with the primary purpose of assisting persons such as petitioners with the necessary funds to begin family farming operations. "The basic objectives of the Farmers Home Administration is making F.O. [Farm Ownership] loans are to assist eligible applicants to become owner-operators of family farms, to make efficient use of land, labor and other resources, to carry on sound and successful operations on the farm, and to enable farm families to have a reasonable standard of living. . . . These objectives will be accomplished through the extension of credit and supervisory assistance, recognizing the need for additional help to limited resource farmers." 7 C.F.R. § 1943.2. *See generally*, 7 C.F.R. § 1943.1-1943.50. The Farmers Home Administration will make insured ownership loans up to $200,000.00 and guarantee loans for up to $300,000.00. *Farm Ownership Loans* (Farmers Home Administration 1979). It will make direct farm operating loans of up to $100,000.00 and will guarantee up to $200,000.00 for operating purposes. *Farm Operating Loans, Programs Aid No. 1002* (U.S. Govt. Printing Office 1979, No. 666-819.)

Heights, one Ransom, an individual plaintiff who alleged that he was seeking and would qualify for the proposed housing project, was found to have standing. He testified that if the project was built, "he would probably move there, since it is closer to his job." 429 U.S. at 264. His asserted injury was that "his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If the court grants the relief he seeks, there is at least a 'substantial probability', *Warth v. Seldin, supra,* at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he seeks in Arlington Heights. His is not a generalized grievance. Instead, as suggested in *Warth, supra* at 507, 508, n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.,* at 505; *Simon v. Eastern Ky. Welfare Rights, Org.,* 426 U.S., at 41-42. Unlike the individual plaintiffs in *Warth,* Ransom has adequately averred an actionable causal relationship between Arlington Heights' zoning practices and his asserted injury. *Warth v. Seldin, supra,* at 507." 429 U.S. at 264.

In view of this Court's decision in *Arlington Heights,* the court of appeals in the case at bench had no choice but to conclude that respondents had standing. The execution of recordable contracts will definitely result in the sale of over a quarter million acres of some of the finest farmland in the world at below market prices. Under the Secretary's proposed regulations, respondents, as residents of the Imperial Valley, are at the top of the category of eligible purchasers. There is at least as much of a "substantial probability" that they will be among the lucky purchasers as that Mr. Ransom would move into the unbuilt housing project in Arlington Heights. Both respondents and Mr. Ransom have been "thwarted by official action". The actions of third parties are not necessary to

bring about relief. There is a direct "actionable causal relationship" between the District's refusal to require the few hundred excess landowners to execute recordable contracts and respondents' injury. The court of appeals concluded there would be a substantial likelihood that respondents would be able to purchase some of the excess acreage of rich farmland whose productivity depends *entirely* upon the federal subsidy Congress intended for family-size farmers.

Warth v. Seldin, 422 U.S. 490 (1975) does not require a different result. The plaintiffs in *Warth* could not establish the likelihood of obtaining housing absent the restrictive zoning, because realization of their desire for low cost housing was completely dependent upon the efforts and willingness of third parties to build low and moderate cost housing. 422 U.S. at 505. By contrast, respondents in the present case are not dependent upon any third parties for relief. The execution of recordable contracts will result in a quarter million acres of rich farmland going on sale at below market prices. Sales prices will be determined without reference to the incremental value of the land resulting from the federal project. Respondent Yellen and landowners are in substantial agreement that the excess lands have very little value without the subsidized water. In *Warth,* it was alleged that the petitioners' had needs specifically for low-cost housing and thus they were completely dependent upon the willingness of third parties to construct that type of housing. In the present case, respondents do not need the assistance of anyone to make low-cost farmland available. Thus, there is a substantial probability that respondents will be able to achieve their objectives when the excess landowners comply with the requirements of § 46.

Petitioners' response to *Arlington Heights,* referred to repeatedly by the Ninth Circuit, is to ignore it. It is only

by ignoring *Arlington Heights* that the District is able to set up imaginary road-blocks to respondents' standing, because (i) the Secretary could not force a landowner to sell his excess lands, (ii) a selling landowner might not select respondents as buyers, and (iii) respondents would not have "a preference in any respect against any other citizen of the United States, wherever he resides". Dist. Br. 79.

The District appears to be as unaware of the legal precedents and current administrative practice of the Department of Interior as regards the source of repayment of the All-American Canal contract. Its argument is without merit because:

(i) The recordable contract has been the statutory device for procuring compliance with the acreage limitation since 1926. There is no evidence in the record of any excess landowner declining to sign a recordable contract. To the contrary, the District's own counsel told a congressional committee that excess landowners who receive project water on their excess lands "for ten years without having to sell it can make enough money out of it so he can afford to sell it at any old price." *Hearings on S. 1425, 2541, 3448,* Before Sub-Comm. on Irrig. and Reclamation of Senate Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 87, 88 (1958). The excess landowners testifying at trial, some of whom have been receiving project water for almost forty years, testified that their land has no other use than farming. The only possible use for their lands would be to raise "rattlesnakes and rabbits". 4 Tr. 351:13-16. Any suggestion that the handful of excess landowners could use their acreage for other purposes and simply refuse to execute recordable contracts is totally unrealistic, unless they intend to turn the Imperial Valley into a vast reptile and rodent sanctuary. The Secretary has always allowed a period of time to dispose of excess lands and water deliveries continue during the interval. The only means available for the landowners to recoup their investments for

improvements would be to sell their excess lands. (The value of improvements would be included in the sale price. *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1144.)

(ii) The Secretary has been delegated authority under § 10 of the 1902 Act, 43 U.S.C. § 373 and § 46 to adopt the form of recordable contract necessary to carry out the purpose and policies of the Reclamation Act. His proposed regulations, adopted under compulsion of a court order which has now become final, and relied on elsewhere by the District in its brief, specifically denies to the excess landowner the privilege of selecting his own buyer if he elects to accept project water for his excess lands. The 1979 Solicitor's Opinion dealing with subsequent sales, M-36913, 86 I.D. 300, makes it perfectly clear that a landowner who does elect to receive project water for his excess lands will be able to do so only on condition that he surrender his right to sell his land to a person of his own choosing.

(iii) The Secretary's proposed regulations and the December 6, 1979 Opinion of his Solicitor concerning the residency requirement, M-36919, established priorities among eligible, non-excess owners. It is true that at present, persons residing throughout the United States and probably throughout the world own approximately one-half of the irrigable farmland provided with irrigation water through the All-American Canal in the Imperial Valley. However, under the proposed regulations, only those persons otherwise eligible who have their principal place of residence within fifty miles of the excess lands they seek to purchase will be eligible. Respondents fall within the definition of eligible non-excess owners.[163]

[163]The District suggests that respondents were initially allowed to intervene "by mistake" of the Court of Appeals, in that the court considered them to be landowners instead of non-landowners. Dist.Br. 77. The error was insignificant to the decision allowing the initial intervention. Neither the District nor the landowners sought re-hearing or other relief as they would have been expected to do if the error was of any consequence.

Petitioners can not seriously challenge the court of appeals' determination that the requirement that owners of excess lands execute recordable contracts would redress respondents' inability to purchase farm land at prices inflated by the incremental value of the project. Petitioners' contention on standing not only has no validity in general but it also completely ignores the unique mechanism of the recordable contract in § 46. The Court has only recently concluded that standing may result where there is market activity having an effect on market prices. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 110-11, 115 (1979). The recordable contract will have a definite effect in bringing about a large disposition of over a quarter million acres of rich farmland in the Imperial Valley having a dependable supply of irrigation water at below market prices. Congress did not provide a similar statutory device to enforce the residency requirement and therefore the court of appeals determined that respondents lacked standing in that case.

Petitioners presented the claim that the panel's decision in the acreage and residency cases was internally inconsistent, as well as being in conflict with other Ninth Circuit cases involving standing to raise issues under the Reclamation Act, *Bowker v. Morton,* 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966). In denying rehearing, the panel carefully pointed out the significance of the recordable contract in the acreage case at bench and how the procedural issue was in a different posture in this case than in the others. 595 F.2d at 527-28. Petitioners' suggestions for rehearing in banc were passed on to the full court, and no judge of the Ninth Circuit requested a vote on the suggestions. 595 F.2d at 528. Apparently, the Ninth Circuit was satisfied that the decision on standing in the case at bench was completely consistent with all of its earlier decisions under the

Reclamation Act. This Congressionally mandated procedure, having no parallel elsewhere in the law, provides, at the very least, a "substantial probability" that the respondents will become family farmers in the Imperial Valley, enjoying the vast water subsidy Congress intended for them, rather than the 150 farming operations who own most of the excess lands.

C. The repayment of one-half of the construction costs does not eliminate the price control provision of § 46 for the initial breakup of excess lands.

Thirteen and one-half years after Solicitor Barry issued his Opinion and eleven years after the government filed its complaint, the District reached the half-way mark in its repayment contract with the government, having repaid one-half of the costs of constructing the All American Canal from revenues received from the sale of hydroelectric power. After the court of appeals filed its principal opinion on August 18, 1977, the District and the landowners petitioned for rehearing and suggested rehearing in banc. For the very first time in this litigation, the District challenged the jurisdiction of the Secretary to exercise the price control device of § 46. The District has filed in this Court an Affidavit of Robert F. Carter, an official of the District. Dist. App. 243a. Although this Affidavit is not part of the record on appeal, respondents shall treat it as a correct statement of the facts it reports.

The court of appeals declined to reconsider its principal opinion because, as it previously held in *United States v. Tulare Lake Canal Co.,* 535 F.2d 1093, the payoff language of § 46 does not apply to the *initial* breakup of excess lands, but only to *subsequent* sales. Referring to its opinion in *Tulare,* the court said:

> . . . the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior

must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. *Id.* [535 F.2d] at 1118. As we recognized in our opinion [in the present case] of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the *Tulare* formula will be at the low-market price. 595 F.2d at 527.

The District's facile assertion that the court's decision "flies so directly in the face of the statute as to require no argument" (Dist.Br. 84) not only attempts to treat a single part of Section 46 completely out of context, but also disregards the purpose of the statutory language and contains an implication finding no support in either the administrative practice or judicial decisions under the reclamation law.

The issue decided by the Ninth Circuit in the present case and *Tulare* was previously determined administratively by Solicitor Barry in a formal opinion. Sol. Op. M-36634, 68 I.D. 372 (1961). Solicitor Barry reported that the crucial element in Section 46 of the Omnibus Adjustment Act and Section 12 of the Reclamation Extension Act of August 13, 1914, 38 Stat. 686, 43 U.S.C. § 418, from which it was derived, was the "requirement for the sale of excess land at a limited price". 68 I.D. at 377. This "crucial element" represented a change in earlier reclamation enactments and "came about because of the resolve of the Congress, as a matter of deliberate policy, to prescribe by statute measures aimed specifically at the early breakup of pre-existing large holdings. The Congress so acted . . . because the 1902 and 1912 Acts had not achieved any

substantial breakup of large pre-existing private holdings." *Ibid.*

In a lengthy, carefully documented opinion by Chief Judge Browning, the Ninth Circuit in *Tulare* described the evolution of the Reclamation Act from its enactment in 1902 through the adoption of Section 46 in 1926 and the administrative interpretations of Section 46 after its enactment. 535 F.2d at 1119-1143. *Tulare* involved a contention that repayment of construction costs relieves a landowner from the requirement to execute the recordable contract mandated by Section 46. The Ninth Circuit rejected the argument as being completely inconsistent with the basic goal of the reclamation law "to create family-*sized* farms in areas irrigated by federal projects". (emphasis added) 535 F.2d at 1119. The goal is not to create "family farms" of whatever size, as suggested by the landowners, but family-*sized* farms as defined by Congress, i.e., 160 acres.

Examination of Section 46 shows that it is broken down into two segments. The first part refers to the initial breakup of excess lands and does not contain any language restricting the requirement that the Secretary assert price control:

> All irrigable land held in private ownership by any one owner in excess of one hundred sixty irrigable acres shall be appraised . . . and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value . . . without reference to the proposed construction of the irrigation works . . . and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to extend those fixed by the Secretary of the Interior;

Following the first segment of Section 46, broken off by the semicolon, is the language dealing with subsequent sales where the limitation on the Secretary's authority to control prices expires upon the repayment of one-half of the construction costs:

> and that until one-half of the construction charges against such lands shall have been fully paid, no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary . . .

The Ninth Circuit held in *Tulare* that Section 46 "leaves no room for an implied option to avoid initial breakup of excess land holdings by paying construction costs." 535 F.2d at 1135. Although the landowners in *Tulare* sought to be freed from the requirement to sell their excess lands at below market prices by paying their share of the construction costs in advance, that factor is not significant here, for the District's attack on *Tulare* is openly on the substance of that opinion. Dist. Br. 84. It was the payment of one-half of the construction charges which was the basis of the claim in *Tulare* that the questioned language "recognizes at least a partial 'payout' theory". 535 F.2d 1134. The Ninth Circuit wasted little time disposing of this contention:

> This is a patent misconstruction of the meaning and purpose of the clause in question. Its purpose and effect was to strengthen the Secretary's hand in dealing with speculative sales, not to weaken it by permitting avoidance of price control by partial "payout". *Ibid.*

The *Tulare* opinion stands for the proposition that there must be an initial breakup of excess lands and that the repayment of construction costs, either entirely as in *Tulare,* or one-half as in *Imperial,* does not provide a built in opportunity to circumvent the law.

The District wants this Court to infer that the Department of Interior has adopted an administrative practice of recognizing the expiration of the Secretary's authority to assert price control after one-half of the construction costs are repaid, relying upon the 1979 Solicitor's Opinion on subsequent sales. M-36913, 86 I.D. 300, (1979). Dist. Br. 74. The District has entirely misconceived the meaning of that Opinion. The subject of the Opinion is "Control of the Sale Price of Formerly Excess Lands". The language quoted from page 1 of the Opinion specifically states that Section 46 requires the Secretary to control and approve the purchase price of *initial* sales of excess land and *thereafter resales* until one-half of the construction costs have been repaid. The Opinion itself is concerned exclusively with the *resale* of formerly excess lands and is entitled "Reclamation Law—Control of the Sale Price of Formerly Excess Lands". The Opinion was intended to interpret the requirements of the law applicable to "turn-around" sales of excess lands, and placed heavy reliance (at pp. 4, 5 and 8) upon the very opinion of the Ninth Circuit the District seeks to disregard, *United States v. Tulare Lake Canal Co.* The proposed regulations are consistent with both the Solicitor's Opinion on subsequent sales and *Tulare.* 43 C.F.R. § 426.10(a), Dist.App.237a. As long as land is under recordable contract, price control will be "required regardless of the status of payment of construction charges". *Ibid.* A landowner is required to execute a recordable contract only when he owns excess lands prior to the initial breakup. After the initial breakup, they are no longer under a recordable contract. It is at that point in time, *after* the initial breakup, that the Secretary's authority to control prices is effective only until one-half of the construction costs are repaid.

During pre-litigation negotiations with the District, the Department of Interior indicated it would be willing to

recommend to Congress that legislation be adopted to allow excess lands in the District to be appraised at current market prices. 3 Tr. 185:25-188:13, 595 F.2d at 527. Pl. Exs. 8A-8Q. Those negotiations were unsuccessful and the District elected to take its chances in court. It is now too late to complain about the outcome.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

February, 1980

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

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Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

ON WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

REPLY BRIEF OF LANDOWNER PETITIONERS

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REPLY BRIEF OF LANDOWNER PETITIONERS

I. NOTHING IN THE BRIEFS OF RESPONDENTS OR THE UNITED STATES JUSTIFIES DISREGARDING FIVE DECADES OF HISTORY.

As petitioners said in their opening brief, the heart of this case is not a series of legal arguments but the indisputable fact that fifty years ago Secretary Wilbur ruled that acreage limitation did not apply in Imperial Valley, and that since then two generations of people have planned their lives, expended their lives' labor and invested their savings on the basis of that longstanding contemporaneous interpretation of the Project Act. The relevant question now before the Court is whether anything in the briefs of

respondents, the United States, or the *amici curiae* requires the overturning of the status quo in Imperial Valley — a status quo defined in a contract with the government, approved in a special election, confirmed by an *in rem* judicial decree, and recognized in practice throughout the administrations of seven Secretaries of the Interior and five Presidents. Nothing in the opposing briefs could possibly justify such a result.[1]

A. Breaking Up Imperial Valley's Farms Today Would Serve No Relevant Purpose.

Respondents' principal argument is that acreage limitation should be applied in Imperial Valley, after 50 years, in order to fulfill the policies they assert underlie § 46 of the Omnibus Adjustment Act: the promotion of "family farms" as opposed to "large scale corporate absentee ownership," and the prevention of speculative gain resulting from federally-subsidized reclamation water. Respondents overlook that the only relevant congressional policy, that of the Congress that enacted the Project Act, mandates satisfaction of the present perfected rights of Imperial Valley farmers, not their destruction. But even if respondents were right as to the policies relevant here, it is plain that those policies would not be advanced by breaking up the settled economy of Imperial Valley.

1. Imperial Valley is Farmed by Families Today.

The record shows that petitioners, who were found by the district court to be representative of the class of excess landowners, maintain homes in the Valley with their families and farm the land they own. Landowner Pet. Br. 18-20. Understandably unhappy with what the record shows, respondents go outside it, and assert on the basis of inferences drawn from census figures that "large scale, absentee ownership has long characterized the Valley." Res. Br. 67. The simple census figures cited by

1. The United States has filed a brief herein, although the United States was not a party to the judgment of the Ninth Circuit in this case, and accordingly is not a party before this Court. The status of the United States before this Court is solely that of an *amicus*.

respondents are misleading, however, since they fail to distinguish between ownership by business corporations, and ownership by family corporations and family partnerships. The record, for example, shows that title to petitioner Brown's land is in a husband-wife corporation, 4 Tr. 339, that petitioner Nilson farms in partnership with his two brothers, 4 Tr. 380, and that petitioner Brockman farmed in partnership with his brother for 15 years. 4 Tr. 401. Such arrangements are common in the Valley.

Exact facts and figures on the extent of family ownership of Imperial Valley farms were assembled in 1977 for the use of the Senate Committee on Energy and Natural Resources. The figures show that 919 of the 973 farms in the Valley, or 94.5%, are operated by single family or multi-family enterprises. Only 15 of the farms are operated by business corporations or investor partnerships. If acreage is examined, family farm operations account for 93% of the cultivated irrigable land in the Valley.[2]

The farms in Imperial Valley are family enterprises, not absentee corporations. A policy to promote family farms is not served by driving families off the land they have farmed for decades.

2. There is No Speculative Gain To Be Prevented Today.

Breaking up the Valley's farms, fifty years after the Project Act, is equally pointless if the goal is to prevent speculation. Speculators on the Boulder Canyon Project,

2. *Acreage Limitations on Bureau of Reclamation Projects: Hearings on S. 242, S. 1812, S. 2310, S. 2606 and S. 2818,* Before the Subcom. on Public Lands and Resources, Sen. Comm. on Energy & Natural Resources, 95th Cong., 2d Sess. 440 (1978). *See also, Reclamation Reform Act of 1979: Hearings on S. 14, Etc.,* Before Subcom. on Energy & Research Development, Sen. Comm. on Energy & Natural Resources, 96th Cong., 1st Sess. 120, 247 (1979); 125 *Cong. Rec.* S. 12480 (daily ed., Sept. 13, 1979).

Nor, as respondents imply, is irrigated land in the Valley farmed predominantly by companies such as Inter Harvest, Inc., Holly Sugar Co., and the Irvine Company. Res. Br. 68. For the facts with respect to so-called "big corporate landowners" in Imperial Valley, see 125 *Cong. Rec.* S. 19264 (daily ed., Dec. 19, 1979).

if there were any,[3] are long gone; the present holders of Imperial Valley farms purchased their land at post-Hoover Dam market prices that reflected the value of any financial benefits offered by the Project Act.

For the same reason, respondents' talk of subsidies is beside the point. Simple economics teaches that the capitalized value of any subsidy will be included in the market price of any lands to be benefitted. Indeed, as the authorities cited by respondents explain, market value of land includes the value of the prospect of water. Res. Br. 17. The underlying theory of § 46 is that market prices for land will include "the capitalized value of the federal subsidy." Res. Br. 19. One who buys land at market value after water deliveries have begun receives no free subsidy; he pays a purchase price that includes the "capitalized value of the federal subsidy."

The record graphically shows the extent to which present owners have already paid for any benefits that accrued from the Project. Respondents and the United States both assert that the value of Imperial Valley farmland, apart from the benefits derived from the Boulder Canyon Project Act, would have been $25 to $50 an acre in 1971. Res. Br. 169; U.S. Br. 78. Yet petitioners' excess lands were all purchased after completion of the Project at prices many times greater than dry land prices, or in other words at market values that reflected any benefits from the Project, including any subsidy. Petitioner John Kubler and his wife, for example, farm 540 excess acres which they acquired in the 1960's at high market prices. In 1964, before the Barry Opinion, they paid $1,150 per acre for a 120 acre parcel.

3. It should be emphasized that there is no evidence of any speculation. To the contrary, land values in Imperial Valley were higher before completion of Hoover Dam and the All-American Canal than for many years after. Average values per acre for Imperial Valley farmland were $167.25 in 1920, $155.76 in 1930, $77.91 in 1940, $123.69 in 1945 and $241.00 in 1950. *1925 Census of Agriculture,* p. 456; *1935 Census of Agriculture,* Vol. I, p. 938; *1945 Census of Agriculture,* Vol. I, Part 33, p. 21; *1954 Census of Agriculture,* Vol. I, Part 33, p. 51.

4 Tr. 369. Petitioner Robert Brown and his wife farm 560 excess acres, which they acquired in 1961 and 1962 for an average price of $680 per acre. 4 Tr. 343-46.[4]

These figures do not simply demonstrate the absence of any subsidy to the present owners of Imperial Valley farmland. They also show the disastrously unfair consequences that will result to individual landowners if they are now forced to sell their land at a tiny fraction of what they paid for it. John Kubler and his wife mortgaged their farm for $345,000 in order to pay $391,000 for their "excess" acres. If forced to sell the "excess" portion of their farm at $25 per acre, they would lose $377,500 of their investment cost and be burdened with a $331,500 mortgage on their remaining 320 acres. 4 Tr. 366-71.

Nor would the losses simply be loss of land values. As the government's questioning of Mr. Kakoo D. Singh demonstrated, human values would be shattered:

"Q Do you think you are going to be harmed?

"A Oh, yes, if I lose the case.

"Q How?

"A I lose my ground. I spend my whole life fixing that ground, if I lose 400 acre maybe they going to sell at any price.

"Q Tell us everything that you think.

"MR. WORKS: About what?

4. Petitioner Stephen Elmore acquired his excess lands between 1951 and 1964, paying prices as high as $952 per acre in 1960. 4 Tr. 358-60. Charles Nilson acquired his excess lands during the period 1947-1961, paying prices as high as $825 per acre in 1958. 4 Tr. 381-87. Clara Gutierrez acquired her excess lands during the period 1948-1958, paying as much as $400 per acre in 1958. 4 Tr. 390-96. Harold Brockman acquired his excess lands during the 1940's and 1950's, paying as much as $344 per acre in 1957. 4 Tr. 400-02. Rose Singh acquired her excess lands during the period 1942-1958, paying as much as $500 per acre in 1958. LX-DK. John Bryant purchased his excess lands from 1945 to 1959, paying $400 per acre in 1959. 4 Tr. 415-21.

"BY MR. MOORMAN:

"Q That you think how you may be hurt. I just want to make sure that I get it all.

"A Well, I work for 50 years fixing this ground, I don't know this law going to be passed; if I know this law going to be passed I no have to buy, I no fix the ground. I just hear in 1965 that 160 acres, you know; before I never heard anything. I bought about $150,000 in machinery, you know. If they take my machinery it is no use for me, it is nothing but junk." LX-DK, p. 9.

Nothing in our history or traditions suggests that the 70th Congress, or indeed any Congress at any time, would knowingly have legislated results such as these.

B. A Reasonable Administrative Construction, Relied on for Decades, Must be Decisive as to the Proper Interpretation of the Project Act.

The United States implies that longstanding administrative practice is only one factor in determining Congress's intent under the Project Act — and not a very important factor. U.S. Br. 54-55. The doctrine of administrative interpretation, however, is not a mere canon of statutory construction. It is, as this Court has emphasized, a "venerable principle" of federal jurisprudence. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). Where social and economic conditions have developed in reliance on a longstanding contemporaneous interpretation of an act of Congress, fairly susceptible to different constructions, it would be fundamentally unfair to disturb the administrative construction and upset the vast complex of private rights acquired in reliance thereon, simply to vindicate a supposedly more accurate, latter-day theory of what Congress originally intended. *See* Landowner Pet. Br. 24-27.

Accordingly, every reasonable doubt must be given to a contemporaneous interpretation of a statute made by those who were responsible for its enforcement and administration. This Court has held that a settled administrative construction "may add a gloss or qualification to what is on its face unqualified statutory language." *Saxbe v. Bustos,*

419 U.S. 65, 74 (1974). Such a construction is "decisive" of statutory meaning even "though inconsistent with the literalism of the act." *United States v. Alabama G.S. R. Co.,* 142 U.S. 615, 621 (1892). *See FHA v. Darlington, Inc.,* 358 U.S. 84, 90 (1958). To sustain that administrative construction, the Court "need not find that" it is the result the Court "would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). All that need be shown is that the administrative construction "is at least an admissible one." *McLaren v. Fleischer,* 256 U.S. 477, 480-81 (1921); *Universal Battery Co. v. United States,* 281 U.S. 580, 583-84 (1930). Those who would turn back the pages of history and second-guess a contemporaneous construction of a statute carry an onerous burden of proof. It is not enough simply to show that the challenged construction "could with reason be said to have been wrong." *Hewitt v. Schultz,* 180 U.S. 139, 156-57 (1901). The administrative construction must be shown to have been "plainly" and "palpably wrong." *Id.* And this requires a showing that the statute is so "free from doubt" *(id.)*, and "so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933).

That is especially so where, as here, there is every reason to believe that the administrative construction represents as accurate an approximation of the intentions of the 70th Congress as anyone is ever likely to achieve. The Boulder Canyon Project, to put it mildly, was not a low-visibility matter in the 1920's and 1930's. It was the largest undertaking ever begun by the federal government, one which had been debated for years, passionately advocated and passionately denounced. It was the principal business, for years, of the Department of the Interior and of the Bureau of Reclamation. Commissioner Mead, Chief Counsel Dent, and Secretary Wilbur participated in hearing after hearing in Congress. They undoubtedly held scores of private conversations with interested Congressmen and Senators and were privy to votes and debates in executive session. Many things now forever lost to us were known first-hand to Wilbur, Dent and Mead. They were, quite simply, much more likely to have known the true

intention of the 70th Congress than is anyone today. *Cf. California v. United States,* 438 U.S. 645, 648 (1978). As Solicitor General Griswold noted, the view of Wilbur, Dent and Mead that the Act did not impose acreage limitation in Imperial Valley "did not cause a ripple at the time, and it was not seriously questioned in Congress or elsewhere. . . . It is hard . . . to think of officers who would have been better qualified to know what the resolution of this problem was."[5]

C. Respondents' Attacks on the Administrative Practice Are Without Substance.

Respondents and the United States attempt to minimize the importance of the nearly five decades of consistent administrative practice by characterizing the Wilbur ruling as a political maneuver, and by pointing to supposed "doubts" as to the correctness of the ruling and to the Barry Opinion, 31 years later, to show an "inconsistency" in the administrative view. Res. Br. 53-59; U.S. Br. 59-64. There is nothing to any of these points.[6]

The surest proof that the Wilbur ruling was not simply a political maneuver, as Solicitor General Griswold observed, is that

> "no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different." Appendix, p. A-5.

5. Memorandum by Solicitor General Griswold, Apr. 8, 1971, reprinted in 126 *Cong. Rec.* S. 1633 (daily ed., Feb. 20, 1980). This memorandum, published for the first time only last month, is included as an Appendix to this Reply Brief.

6. Respondents' innuendo that Secretary Wilbur's ruling was hastily contrived is contrary to historical fact. See Mr. Ely's recollections set out in *Reclamation Reform Act of 1979, Hearings on S. 14, Etc.,* Before Subcomm. on Energy Research & Development, Senate Comm. on Energy & Natural Resources, 96th Cong., 1st Sess. 439-40, 468-73 (1979).

Failure to raise doubts was not because of ignorance. Commissioner Mead remained in office till his death in 1936; he monitored the *Hewes* proceedings closely, and sought to give assistance to the District and its lawyers in their efforts to defeat Malan's contention that the contract was invalid because of its failure to include acreage limitation. LX-AQ. Malan's counsel wrote Secretary Ickes directly, calling attention to the reasons for Malan's claim that the contract was illegal, including its failure to provide for acreage limitation. LX-BK, p. 1, and attachment at pp. 18-19. When Secretary Ickes signed a contract with Coachella County Valley Water District on October 15, 1934, for repayment of its share of the cost of the All-American Canal, he followed the Wilbur ruling by omitting any provision for acreage limitation.[7] During the Ickes administration, Commissioner Page invoked the Wilbur ruling and the decision in *Hewes v. All Persons* in advising the Federal Land Bank that it was "the opinion of the Bureau of Reclamation that the [160-acre] limitation does not apply to . . . lands [in Imperial Valley]." LX-BR. Assistant Reclamation Commissioner Warne took the same position before Congress. *Hearings on H.R. 3961,* 78th Cong., 2d Sess., Part IV, pp. 599, 764-65 (1944). Secretary Ickes never expressed disapproval of the Wilbur ruling, nor did Commissioners Mead or Page.

No weight at all can be given to "doubts" that respondents say were prevalent in the Department of the Interior in the late 1940's. Former Solicitor Weinberg testified that those in the Department who then harbored doubts regarding the Wilbur ruling consciously decided *not* to raise the acreage limitation issue during the 1952 renegotiation of the All-American Canal Contract, because it would

7. The contract is printed in Wilbur & Ely, *The Hoover Dam Documents,* A633 *et seq.* (2d Ed. 1948). Acreage limitation was imposed in Coachella only 13 years later, when the District signed a new contract providing for the construction of a distribution system and the irrigation of 56,724 acres of *new* land. *See* Landowner Petitioners' Brief, p. 15n.14.

have been "counter productive" and because the District "would never have signed the contract." 3 Tr. 255. Moreover, isolated doubts periodically expressed by attorneys within the corridors of government are not a basis for denying the validity of a longstanding administrative construction. The reason for the doctrine of administrative construction is to protect rights and expectations acquired in legitimate reliance upon longstanding governmental practice. Citizens rely upon the *practice* of the government, and are not privy to expressions of doubt that might be expressed by lawyers within the government from time to time.

Solicitor Barry's purported reversal of the Wilbur ruling in 1964 likewise affords no basis for characterizing the administrative interpretation of the Boulder Canyon Project Act as "inconsistent" and therefore undeserving of recognition under the doctrine of administrative construction. This Court's decisions make clear that a latter-day attempt to change an administrative position does not defeat application of the doctrine of administrative construction. *California v. United States,* 438 U.S. at 675-76 & n.30; *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 735-36 (1950); *FTC v. Bunte Bros., Inc.,* 312 U.S. 349, 351-52 (1941); *United States v. Chicago N.S. & M.R. Co.,* 288 U.S. 1, 13 (1933); *Luckenbach S.S. Co. v. United States,* 280 U.S. 173, 182 (1930); *United States v. Finnell,* 185 U.S. 236, 243-44 (1902).

II. CONGRESS'S INTENTION TO PRESERVE THE STATUS QUO IN IMPERIAL VALLEY WAS NOT A DEPARTURE FROM CONCEPTIONS OF NATIONAL POLICY THAT PREVAILED IN 1928.

Respondents argue that a congressional intention not to impose acreage limitation in Imperial Valley would have been a departure from prevailing views of national policy and an "exception to the then prevailing practice governing enforcement of acreage limitation where landowners receiving project water had preexisting 'vested rights.'" Res. Br. 86. This argument is wrong for three reasons: (1) Congress in the 1920's did not envision acreage limitation as a mechanism designed to break up successfully functioning and fully developed agricultural communities like Imperial Valley; (2) Congress in 1928 knew that the conditions in Imperial Valley were wholly unlike those which the acreage limitation laws addressed and did not view the All-American Canal as a reclamation project; and (3) administrative practice at the time provided for full recognition of vested water rights, and required acquisition or satisfaction of such water rights even when they were held by excess lands. As elaborated below, a water law expert of the 1920's would have been extremely surprised if Congress *had* imposed acreage limitation on Imperial Valley.

A. National Policy, As Articulated By Congress In The 1920's, Did Not Envision Application Of Acreage Limitation To Break Up A Successfully Functioning And Fully Developed Agricultural Community Like Imperial Valley.

Respondents suggest that by the mid-1920's there was a widespread practice of applying acreage limitation in a way that denied recognition of pre-project vested rights. That suggestion is contrary to the historical facts, as will be shown below. *See infra,* pp. 19-21. But irrespective of the validity of the assertion, what is significant is that respondents are unable to point to a single *congressional statement* in the 1920's expressing a *congressional perception* of national policy requiring imposition of acreage limitation in the unique type of situation that prevailed in Imperial Valley.

During the congressional proceedings which led to the enactment of § 46 of the 1926 Act, no congressman or administrative spokesman ever uttered a word suggesting that national policy required the use of § 46 to effect a wholesale breakup of farms and redistribution of land in stable, flourishing communities where full irrigation development, intensive cultivation and complete settlement had long since been attained. To the contrary, whenever acreage limitation

was discussed in Congress in the 1920's, its proponents always spoke of its application in the context of

— "unimproved desert land,"[8] or

— "sagebrush land,"[9]

— worth only "about $5 an acre,"[10]

— owned by "speculators,"[11]

— who do "not intend to cultivate it."[12]

The 1924 Fact Finders' Report, which recommended the § 46 divestiture mechanism to Congress, described the reclamation program in the following terms:

— "The reclamation act gave a unique opportunity for working out colonization plans which would provide for the fundamental needs of settlers." *Sen. Doc. No. 92*, 68th Cong., 1st Sess. 124 (1924).

— "Consideration must be given to . . . not merely reducing raw land to cultivation, providing buildings, implements, and stock, but in addition creating new social communities. Roads, telephones, schools, churches, often villages or towns — all the agencies necessary for modern life . . . [have] to be provided for at one time." *Id.* at 122.

— "Aside from the irrigation works and the unformed dirt roads, everything required to transform the desert into productive land [must] . . . be done. The land must be cleared. The farm unit must be fenced. A house for the family and a stable for the work animals have to be built, and provision has to be made for a water supply for household use." *Id.* at 128.

— "Much of the land under these irrigation systems . . . [is] of a rough, rolling character, which need[s] leveling and smoothing, really an engineering problem, before water . . . [can] be applied . . . successfully." *Id.* at 38.

8. *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 348 (1924).
9. *Id.* at 38, 55.
10. *Id.* at 55, 348.
11. *Id.* at 38.
12. *Id.* at 56.

— "When development shifted from public to private land, no adequate measures were taken to curb the selfish inflation of prices, so that unwary and oversanguine settlers have paid as high as $200 an acre for *unimproved sagebrush land.*"[13] *Id.* at 124.

— "Large holdings of private land which [were] . . . *without water,* had very little value before the project was authorized. When the water became available their value immediately arose. . . . These private lands were often held at a very high figure, and the settler, full of hope, frequently agreed to pay a high price for the land. . . . Such private land, when held for speculative purposes, only added to the difficulty of the farmer who was engaged in winning a homestead from the desert." *Id.* at 114.

To be sure, the Fact Finders Report did refer to a few early reclamation projects where some privately owned lands had been irrigated prior to construction of project facilities.[14] *Id.* at 131. Those projects, however, involved situations radically different from the conditions prevailing in Imperial Valley, and Dr. Elwood Mead, who was one of the Fact Finders, was obviously aware of that difference when he told Congress in 1926 that acreage limitation would not be applicable in Imperial Valley. While the early projects mentioned by the Fact Finders did involve some prior irrigation, most of the project lands were still undeveloped sagebrush lands.[15] The lands did not have vested

13. Here, as elsewhere, emphasis is supplied unless otherwise noted.
14. The seven projects mentioned by the Fact Finders were Salt River, Uncompahgre, Yakima, Rio Grande, North Platte, Boise and Newlands.
15. On the Uncompahgre Project, 60 percent of the lands were unirrigated. Pl. Ex. 60, pp. 762-63. On the North Platte Project, most of the lands were unirrigated public lands (Pl. Ex. 70(d), p. 133), and the project ultimately brought water to "335,000 acres of sagebrush and range land." Pl. Ex. 60, p. 550. On the Boise Project, 59,460 of the project's 90,000 acres were unirrigated public lands. Pl. Ex. 70(d), p. 133. On the Newlands Project, the majority of the lands were unirrigated public lands. *Id.* at

rights to a full supply of water.[16] To the extent that small irrigation systems existed on these early projects, the government always purchased and rebuilt those systems. Thus, in addition to providing storage reservoirs, there was "a complete reconstruction of all existing works, which, after purchase by the Goverment, were enlarged and practically rebuilt." *Id.* at 131. Canal and lateral distribution systems were built for the districts involved.[17] And, most important for present purposes, if any previously irrigated lands on these projects had a full water right that was vested, the government avoided the cost of purchasing those rights *by agreeing that the water covered by the rights would be*

133. The Teiton Division of the Yakima Project covered 24,000 acres of unirrigated land, and excluded cultivated lands in an adjoining area which had prior water rights. Pl. Ex. 19, p. 999. The Sunnyside Division of the Yakima Project covered 40,000 acres of undeveloped lands. *Id.* at 1004.

16. On the Salt River project, the supply of water was "inadequate for the land in cultivation." Pl. Ex. 60, p. 664. On the Uncompahgre project, lands previously irrigated with an insufficient supply from the Uncompahgre River received an entirely new and different supply brought across the mountains via tunnel from the Gunnison River. *Id.* at 762. Lands on the Rio Grande Project did not have a vested right to a full water supply because the river always ran dry in the El Paso vicinity during the summer and longer periods. *Id.* at 632. On the North Platte, small irrigation systems had failed because the river was dry during growing seasons. *Id.* at 550.

17. On the Salt River Project, the government built 176 miles of canals and 1,132 miles of laterals. Pl. Ex. 665. The government constructed 783 miles of canals, laterals and drains to serve the Uncompahgre Project. *Id.* at 763. On the Rio Grande Project, 1,060 miles of canals, laterals and drains were built, on the North Platte 1,971 miles of such facilities were built, on the Boise 2,222 miles of distribution facilities were built, and on the Newlands Project, 939 miles of canals and laterals were built. Pl. Ex. 60, pp. 37, 536, 551 & 633.

transported through government canals to the excess lands which held the rights.[18] *See* pp. 19-21, *infra.*

This was the factual setting in which acreage limitation policy in the 1920's was formulated. The physical and economic conditions which were then associated with reclamation undertakings and acreage limitation were as different from the conditions prevailing in Imperial Valley as night is from day. The policies sought to be achieved on ordinary reclamation projects by application of § 46 were wholly inapposite to the circumstances existing in the Valley. And to suggest otherwise is to ignore historical fact.[19]

18. At page 32 of its brief, the government quotes a comment by the Ninth Circuit in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1112 (1976), to the effect that some early projects involved only construction of storage facilities to serve previously irrigated lands. The Ninth Circuit's observation is historically wrong. The Fact Finders' Report was the only authority cited by the *Tulare* court, and as shown above, the Fact Finders' Report actually contradicts the Ninth Circuit's observation. More importantly, the *Tulare* court was apparently unaware of the Reclamation Service's actual practice, in both the 1920's and earlier, of satisfying vested water rights held by excess lands *See* pp. 19-21, *infra;* 43 C.F.R. § 230.70.

19. Respondents' brief asserts that Projects since 1928 frequently have involved private lands having a history of pre-project irrigation. Res. Br. 50. Administrative practice as it evolved on other projects in the decades after 1928 is plainly irrelevant to the perceptions and intention of the Congress which enacted the Project Act. Moreover, the evidence upon which Respondents rely does not show a post-1928 practice of imposing acreage limitation to deny satisfaction of fully vested water rights. The evidence is Exhibit 17, a survey which was conducted by the government in 1968 to compile data on projects which included lands which were irrigated prior to construction of government facilities. Examination of Exhibit 17 reveals that on the 10 projects which were contracted for in the 1930's and 1940's, *sixty-nine percent of the lands* to be served were dry lands with no prior irrigation development. The Tucumcari Project contract, the only one in the survey dating to the 1930's, covered 45,000 acres, all of it previously unirrigated. Pl. Ex. 17. On those projects in the 1940's where there were some previously irrigated private lands, the evidence indicates that such lands did not have prior vested rights to the full supply that was to be developed for them by government facilities. *See e.g.*, Pl. Ex. 13, p. 3 (Coachella); Pl. Ex. 29 (Ivanhoe); Pl. Ex. 17 (W. C. Austin); Pl. Ex. 28 (Orange Cove).

B. Congress Did Not View The Boulder Canyon Project Act As a Reclamation Project Designed to Achieve the Sorts of Objectives That Were the Focus of the 1902 and 1926 Acts.

It is clear that Congress in 1928 believed that the Boulder Canyon Project Act was designed to achieve unique purposes quite unlike those which were the subject of the Fact Finders' 1924 recommendations and § 46 of the 1926 Act. In describing the many purposes of the project, the final House Report listed six: (1) flood control, (2) avoidance of water deliveries through Mexico, (3) supply of domestic water needs for coastal cites, (4) development of hydroelectric power, (5) improvement of navigation, and (6) solution of "international complications." *H. Rep. No. 918*, 70th Cong. 1st Sess. 6 (1928) (LX-DD(K)).

The House Report did not even mention reclamation except as a possibility reserved for the future: "The All-American canal will . . . make possible, at some future date, the irrigation of additonal land, mostly public, lying around the rim of the cultivated area." *Id.* Promotion of settlement — the overriding objective of the reclamation programs envisioned by the Fact Finders and authors of § 46 — was never conceived as a purpose of the Project Act.

Although § 14 incorporated reclamation law for limited purposes, it was clear to everyone in Congress that the Act was not a reclamation project in the ordinary sense of the term. As stated by Senator Pittman, when the Senate first debated the measure in 1927:

> "Mr..President, the Boulder Canyon Bill is not a reclamation bill and it is not a power bill. Its pendency is due solely and entirely to the necessity for flood control of the Colorado River." 68 *Cong. Rec.* 4406 (LX-DD(L)).

The proponents of the Act repeatedly emphasized that it was not intended to authorize reclamation of a single new acre. During the 1926 House Hearings, for example, Commissioner Mead testified:

> "Dr. MEAD: This bill does not go beyond the provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the all-American canal. That is all it deals with. It does not deal with irrigation of new lands at all." *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 32 (1926) (LX-DD(D)).[20]

At the same hearings, Congressman Swing twice reiterated that the bill did not authorize a new reclamation project:

> "Mr. SWING: It does not bring under cultivation new land, but it does . . . make possible at a future date, when Congress is ready, additional reclamation." *Id.* at 105.
>
> • • •
>
> "Mr. SWING: . . . Under this bill the reclamation service does not contemplate making a new project and reclaiming land, and it would necessitate further legislation by Congress when it saw fit to authorize it." *Id.* at 134.

In the 1928 House hearings, Congressman Swing again testified that,

> "No provision is made in this bill for the reclamation of new lands at this time. The public lands are withdrawn from entry to prevent speculation, but it is left to a future date and for Congress to determine when it will authorize a new reclamation project and make appropriations for the distributing system. That matter is not included in this bill." *Hearings on H.R. 5773*, 70th Cong., 1st Sess. 13 (1928) (LX-DD(F)).

Finally, it was also emphasized during the floor debates that the Act did not provide for any new reclamation or authorize any new project:

> "Mr. SUMMERS: Is it not a fact that there would be no new land irrigated except in the Imperial Valley which is now irrigated except by an additional act of Congress?
>
> "Mr. SMITH: That is true." 69 *Cong. Rec.* 9493.
>
> • • •
>
> "Mr. SWING: The bill itself does not authorize a single dollar to reclaim any new land in the United States.

20. See also additional remarks of Commissioner Mead. *Id.* at 34-35.

Public land that might be reclaimed is withdrawn from entry to prevent speculation, but no new reclamation project is authorized in this bill. All that is postponed to some future date, when conditions justify it and Congress sees fit to authorize it." 69 *Cong. Rec.* 9644.

* * *

"Mr. SMITH: There is absolutely nothing in this bill providing for the irrigation of additional land. . . . The bill authorizes the construction of an All-American Canal to carry water to Imperial Valley lands already under cultivation . . . but it does not authorize any appropriations for putting water in new land." 69 *Cong. Rec.* 9784.

* * *

"Mr. SWING: . . . There will be no land reclaimed until Congress sees fit to authorize a reclamation project and authorizes appropriations for . . . distribution systems. . . ." 69 *Cong. Rec.* 9984.

* * *

"Mr. BURTNESS: . . . Can it safely be said . . . that so far as the actual putting of more agricultural land into use is concerned, there is no chance of that being done in less than 10 years and possibly not for 15 or 20 years?

"Mr. SWING: That is correct.

"Mr. SMITH: Even then the Congress would have to authorize the work.

"Mr. BURTNESS: That would be a reclamation project?

"Mr. SMITH: Yes." 69 *Cong. Rec.* 9985.

These statements clearly reflect the perspective and state of mind of the Congress which enacted the Project Act in 1928. Congress did not perceive that it was dealing with a matter of national reclamation policy. The problems it was addressing in the Project Act were not in the least comparable to the circumstances which were the focus of the Fact Finders' 1924 study of reclamation policy. Thus, the premise of respondents' argument that Congress should

not be presumed to have intended a departure from national reclamation policy is wholly without foundation in historical fact. Congress in 1928 did not believe it was engaged in a matter involving reclamation policy.

C. Pre-1928 Administrative Practice Provided for Satisfaction of Vested Rights.

As shown above, Congress's determination not to apply acreage limitation in Imperial Valley was not a departure from prior or contemporaneous perceptions of reclamation policy. The conditions associated with ordinary reclamation projects and the problems to which the 1926 Act was addressed simply did not exist in Imperial Valley. Hence it is not surprising that there was no vigorous debate when acreage limitation provisions for privately owned lands were excluded from the Act.

Furthermore, even had the All-American Canal been viewed as an ordinary reclamation project, Congress's decision to omit acreage limitation in the Valley would not have been viewed as a radical departure from reclamation policy. Indeed, nonapplication of acreage limitation in Imperial Valley was perfectly consistent with a then long-standing administrative practice providing for satisfaction of vested water rights held by excess lands. This practice had started in the very earliest days of the reclamation program, and formal opinions upholding the practice were rendered in 1905 by the Director of the Geological Survey, who then directed the Reclamation Service, and in 1906 by the Assistant Attorney General. 71 I.D. 520 (LX-U); 34 L.D. 351 (LX-V).

The 1905 and 1906 opinions concerned the Umatilla project — which was to irrigate about 20,000 acres, 9,000 of which were privately owned by the Maxwell Land Company. The company had a "partially completed . . . canal system" and had perfected a "vested right" to water for 300 of its acres. LX-U. The question at issue was whether the Reclamation Service could avoid the expense of purchasing the company's vested water right by agreeing to allow the water

covered by that right to be transported through the government-constructed canal to the 300 acres involved.

The Director of the Geological Survey concluded that the proposed delivery of water to satisfy the company's vested right would not be a violation of the 160-acre limitation law:

> ". . . [*I*]*t is the usual practice* in cases where an existing irrigation system is purchased for enlargement, to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. . . .
>
> ". . . [I]t has *heretofore been the policy* of the engineers of the Reclamation Service in negotiating contracts of this kind to provide for the recognition of such rights and the furnishing of the water whenever the plan would be cheaper than to pay for the water rights involved. It is believed that the prohibition of Section 5 of the Reclamation Act . . . does not apply to such cases as this, because the water right is not being sold, belonging as it does to the company, and such ownership being recognized by the contract." LX-U, pp. 4, 6.

The Assistant Attorney General agreed that the government's plan to satisfy the Maxwell Land Company's "vested right" did "not conflict with the provisions of paragraph 5 of the reclamation act." LX-V, p. 354.

In 1910, this administrative practice was explicitly made a regulation, and it has been in the Department's regulations ever since:

> "45. The provision of Section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges." 38 L.D. 637 (1910) (LX-W); *see* 43 C.F.R. § 230.70.

The practice referred to in the 1910 regulation was consistently followed in the years prior to and contemporaneous with the passage of the Project Act. As Secretary

Wilbur noted, the administrative practice of permitting delivery of water through government facilities to satisfy pre-project vested rights of lands in excess of 160 acres was followed on "many projects," including the "Newlands Project, the North Platte Project . . . and others." LX-AO, p. 3. When excess lands were surveyed in 1937 by the Ickes administration, the Commissioner of Reclamation explicitly advised all Bureau personnel that the 160-acre limitation law "is not applicable in a case where a vested non-project water right for a larger area has been acquired and recognized." Bureau personnel were instructed that "irrigable areas covered by vested water rights should be excluded" from the survey of excess lands. LX-BN, pp. 1-2.

Respondents cite a Solicitor's Opinion in 1927 regarding the Minidoka Project, and contend that it reflects an administrative practice contrary to that discussed above. Pl. Ex. 14. In point of fact, however, the practice described in the 1927 opinion relates to an entirely different situation — privately owned lands having only a "*partial* water right," and in need of a "supplemental water right" to be secured from sources to be developed by government facilities. Pl. Ex. 14.[21] In no respect does the 1927 opinion purport to contradict the longstanding administrative practice per-

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21. None of the projects mentioned in the 1927 opinion involved lands having vested rights to a full water supply. For instance, the *Carlsbad Project* covered 25,000 acres, 15,000 of which had been previously irrigated by facilities owned by the Pecos Irrigation Company. A 1904 flood swept away the company's dam and destroyed all of its canals and laterals, and the company went bankrupt. The previously farmed lands were without any means of irrigation and were expected to "return to desert." Pl. Ex. 18, p. 223. The government purchased the company's assets, including its "claims to water," and rebuilt the entire system. Pl. Ex. 60, p. 82; Pl. Ex. 18, p. 225. On the *Owyhee Project*, which was authorized in 1927, there were 32,477 acres irrigated by pumping (Pl. Ex. 60, p. 580) and 73,000 acres "in a natural state covered with black sage." *1928 Report of Bureau of Reclamation*, p. 158. "Much of the land" was reported as "privately owned by people who have neither capital nor intention of becoming irrigators when water is available." *1927 Report of Bureau of Reclamation*, p. 25. The government developed the project by building a dam, 107 miles of canals, 443 miles of laterals and 155 miles of drains to serve 105,016 acres of land with a full irrigation supply. Pl. Ex. 60, p. 580.

mitting the delivery to excess lands of water satisfying pre-project vested rights to a full supply.

In sum, there was nothing about administrative practice prior to and contemporaneous with the Project Act that would have impelled anyone in Congress to engage in vigorous protest at the thought of not applying acreage limitation in Imperial Valley. Nonapplication of acreage limitation in the Valley was entirely consistent with then prevailing reclamation practice.

III. RESPONDENTS FAIL TO SHOW THAT THE LANGUAGE OF THE PROJECT ACT INCORPORATES ACREAGE LIMITATION.

A. Present Perfected Rights Are Not Rights Limited By A Condition Of "Antecedent Eligibility" Under Federal Law.

The principal impediment to applying acreage limitation to the Imperial Valley is § 6, which mandates that petitioners' present perfected rights *"shall* be satisfied." In an attempt to escape the force of this provision, the government would rewrite § 6 to provide that present perfected rights "shall be satisfied *except as otherwise inconsistent with federal reclamation law.*" According to the government, even if a water right was acquired and perfected under state law, the Secretary need satisfy it only if the holder and user of that right has established an "antecedent eligibility" making him "otherwise entitled" under federal law "to receive a designated quantity of federal water." U.S. Br. 36-37. This hypothesis is not only directly contrary to the statutory language, but at odds with the legislative history and plainly inconsistent with this Court's decision in *Arizona v. California.*

When Congress spoke of the water rights of Imperial Valley farmers, it referred to all "the lands in the Imperial Valley which have been irrigated." 70 *Cong. Rec.* 528. As Congress noted, "these lands already have a water right." *S. Rep. No. 592,* 70th Cong., 1st Sess. 4 (1928). There is not one iota of evidence in the legislative history of the Project Act suggesting that Congress intended to guarantee

satisfaction of the water rights of only some of the farms in Imperial Valley, while permitting denial of the vested rights of other farms on some theory of "antecedent eligibility."

The government's theory is also patently contrary to the definition of present perfected rights explicated by this Court in *Arizona v. California.* Present perfected rights were not defined by this Court as entitlements conditioned upon some form of "antecedent eligibility" under federal law. A "present perfected right" is a "water right acquired in accordance with *state law,* . . . existing as of June 25, 1929." 376 U.S. at 341. State law is the measure of present perfected rights, and the only "antecedent" requirement is that the rights have "been exercised by the actual diversion of a specific quantity of water to a defined area of land." *Id.*

B. The Government's Explanation of § 1 Confirms The Improbability of Any Congressional Intention to Impose Acreage Limitation.

The government acknowledges that Congress enacted the § 1 proviso prohibiting water charges in order to avoid the "unfairness of imposing a charge for water upon *landowners* who had a pre-existing right of use."[22] U.S. Br. 41. That is precisely true and it underscores § 1's relevance as an aid to discerning Congress's intent about acreage limitation. Since Congress thought it unfair to charge landowners for deliveries of water to which they had a pre-existing right of use, it is inconceivable that Congress could have intended the far more drastic impairment of these rights that would result from acreage limitation.

C. Section 14 Does Not Incorporate Acreage Limitation.

In an attempt to avoid the undisputed fact that the Project Act does not on its face incorporate the acreage limitation provisions of § 46, the United States argues that all of the reclamation law, including § 46, would apply to the

22. The government thus recognizes that Congress was concerned with respecting pre-existing rights of *landowners,* not simply the pre-existing legal title to such rights held by the District as trustee for the landowners.

Boulder Canyon Project "even in the absence of . . . Section 14." U.S. Br. 29. That notion makes no sense at all. Congress authorizes all kinds of projects dealing with water, but not all water projects are governed by reclamation law. Moreover, as described above, Congress did not view the All-American Canal as a reclamation project. *See* pp. 16-18, *supra.*

Section 14 incorporates reclamation law only as to the "construction, operation and management" of project works. Petitioners' opening brief points out that under the vocabulary of the Act these words have a very limited meaning that does not include matters governing water delivery. Section 10 authorizes contracts for "operation and maintenance," while § 5 separately authorizes contracts for the "delivery" of water for "irrigation." Section 1 proscribes any charge for the "delivery of water," while Section 4(b) requires reimbursement for construction, operation and maintenance. And § 8(a) distinguishes between "construction, management and operation" of the works, on the one hand, and "storage, diversion, delivery, and use of water" on the other hand. The United States's only reply to this textual analysis is that § 8(b) speaks of "constructing, managing, and operating the . . . works herein authorized, *including* the appropriation, delivery and use of water." U.S. Br. 49. This observation about § 8(b) simply proves petitioners' point. When Congress intended the words "constructing, managing and operating" to include reference to appropriation, delivery and use of water, it said so by expressly using the words "appropriation, delivery, and use of water."

Notwithstanding the limited meaning of the words "construction, management, and operation" in the language of the Project Act, respondents assert that the Court in *Ivanhoe* found similar language in § 2 of the 1937 Rivers and Harbors Act "sufficient . . . to represent a Congressional mandate requiring compliance with the acreage limitation." Res. Br. 102. That is not true. In deciding the applicability of the 160-acre limitation law in *Ivanhoe,* this Court did not even cite § 2 of the 1937 Rivers and Harbors Act, much less interpret any of its language. Instead, the Court focused on

legislative debates in the 1940's and on the administrative practice of incorporating 160-acre limitation provisions in the Central Valley Project contracts. The Court reasoned that Congress knew of these contracts when it made continuing appropriations for the project and that this constituted "ratification of administrative construction, and confirmation and approval of the contracts." *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U.S. 275, 293 (1958). Obviously, if the same type of analysis is applied in this case, where Congress made continuing appropriations for the All-American Canal when advised of the Imperial Irrigation District contract and the Wilbur ruling, the conclusion must follow, as it did in *Ivanhoe,* that there has been congressional ratification of the longstanding administrative practice regarding the inapplicability of acreage limitations to the Imperial Valley.

Respondents also observe that "§ 9 requires the opening of public lands for entry 'in accordance with the provisions of the reclamation law' — *a general reference to the reclamation law similar to the general reference in § 14.*" Res. Br. 99. This observation simply proves petitioners' argument about the limited scope of § 14. In two separate places § 9 specifies that something must be done "in accordance with the provisions of the reclamation law." In a third place it specifies that entries shall not "exceed one hundred and sixty acres," the same as the limitation contained in reclamation law. And in a fourth place § 9 specifies that exclusive preferences are to be "subject . . . to the provisions of subsection (c) of section 4 of the Act of December 5, 1924," part of the reclamation law. None of these repeated references in § 9 to reclamation law would have been necessary if Congress had understood § 14 as effecting a wholesale incorporation of reclamation law into the Project Act.

As noted in petitioners' opening brief, § 9's specific incorporation of acreage limitation as to *public* lands demonstrates that Congress would have included a parallel provision for private lands if it had intended acreage limitation to apply to Imperial Valley. Respondents and the government argue that § 9 is not apposite to the subject of

acreage limitation because "it says nothing about water delivery" (Res. Br. 98) and does not deal "with acreage limitation at all." U.S. Br. 42. The first observation is irrelevant and the second is not true. Reclamation law provides for two parallel, but independent, mechanisms of acreage limitation: in the case of public land, acreage limitation is achieved by restricting the size of entries, and in the case of private land, acreage limitation is achieved by restricting water deliveries. Section 9 obviously says nothing about water delivery because it deals only with public lands. What is significant is not § 9's omission of reference to restrictions on water delivery, but the Project Act's omission of any parallel provision imposing restriction on delivery of water to private lands.

IV. RESPONDENTS' ARGUMENTS DEMONSTRATE THAT THE LEGISLATIVE HISTORY OF THE PROJECT ACT IS REASONABLY SUPPORTIVE OF THE CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION OF THE ACT.

Respondents assert that consideration of legislative history is "unnecessary" and "of academic interest only." Res. Br. 117. Implicitly, this argument acknowledges a fact that is beyond dispute — the overwhelming weight of the evidence in the legislative record indicates a congressional intention not to apply acreage limitation in Imperial Valley.

A. Respondents Have Not, And Cannot, Point To A Single Sentence In The Legislative Record Stating That Acreage Limitation Would Be Made Applicable To Privately Owned Lands in Imperial Valley.

As detailed in petitioners' opening brief, proponents and opponents of the Act, including the Commissioner of Reclamation, stated explicitly and unambiguously that the Act would not impose acreage limitation on privately owned lands in Imperial Valley.

1. During the 1924 House hearings, Arthur P. Davis, co-author of the Fall-Davis Report, testified that the bill would not apply acreage limitations to lands already

under irrigation in Imperial Valley. *Hearings on H.R. 2903,* 68th Cong., 1st Sess. 1448 (1924); LX-DD(B).

2. In the 1926 House hearings, Dr. Elwood Mead stated that nothing in the Act would apply acreage limitation to the farms then irrigated in the Valley. *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 32-33 (1926); LX-DD(D).

3. At the same hearings in 1926, Congressman Swing, co-author of the Act, also testified unequivocally that the 160-acre limitation laws would not be made applicable to the farms then being irrigated in the Valley. *Id.* at 33.

4. On April 9, 1928, Senator Ashurst issued a Minority Report on S. 728, stating that the bill would not impose acreage limitation on privately owned lands in the Valley. *S. Rep. No. 592,* 70th Cong., 1st Sess., Part II, pp. 3, 5, 26 (1928); LX-DD(J).

5. On May 2, 1928, Senator Hayden introduced an amendment to include an acreage limitation provision in the Act, and spoke at length on the floor of the Senate, vehemently protesting that absent his amendment the Act would not subject privately owned lands in the Valley to acreage limitation. 69 *Cong. Rec.* 7634-35; LX-DD(M).

6. On May 22, 1928, Senator Hayden spoke on the floor of the Senate and again commented on the need for his amendment providing for acreage limitation. 69 *Cong. Rec.* 9451; LX-DD(N).

7. On May 29, 1928, Senator Ashurst spoke on the floor of the Senate and objected that the Act would permit irrigation of "lands owned . . . in excess of 160 acres." 69 *Cong. Rec.* 10471, 10495 (1928); LX-DD(P), (Q).

8. On December 8, 1928, Senator Ashurst again spoke on the floor of the Senate and again objected that the Act would permit delivery of irrigation water to privately owned lands in excess of 160-acres. 70 *Cong. Rec.* 289; LX-DD(S).

Respondents by contrast cannot point to a single sentence in the six year legislative record stating that the Act would make the 160-acre limitation laws applicable to privately owned lands in Imperial Valley. All that respondents can do is cite generalized statements, *never uttered in the context of discussion of acreage limitation,* to the effect that the Project Act would be "a part of the reclamation law." *E.g.,* Res. Br. 130.

Respondents assert that the statements by Senators Ashurst and Hayden "were apparently not taken seriously by anyone." Res. Br. 132. There is nothing in the record to support such conjecture, and the fact that Hayden and Ashurst were opponents to the Act does not detract from the probative value of their statements, *"especially where, as here, proponents of the bill make no response to the opponents' criticism."* *Arizona v. California,* 373 U.S. 546, 583 n. 85 (1963).

Here, the proponents had ample opportunity to respond to Ashurst and Hayden, but did not. The Majority Report on S. 728 did not respond to Senator Ashurst's Minority Report. On the floor of the Senate, Senators frequently interrupted Senator Ashurst to respond to those criticisms which they believed were premised on a misreading of the bill's provisions. *E.g.,* 70 *Cong. Rec.* 287-89. They did not, however, take issue with his assertion that the Act would not impose acreage limitations. That had been the clear understanding expressed on every occasion when the subject of acreage limitation was discussed.

B. The Substitution of S. 728, Which Omitted An Express Acreage Limitation Provision, for H.R. 5773, Which Contained An Acreage Limitation Provision, Evidences An Intention Not To Apply Acreage Limitation.

As discussed in petitioners' opening brief, Congress's intent not to apply acreage limitation to Imperial Valley is also evidenced by the Senate's action in substituting S. 728, which did not contain an acreage limitation provision, for H.R. 5773, which contained an express provision. Respondents and the United States attempt to evade the differences in the two bills by misreading Senator Johnson's comment that the two bills had "like purposes . . . and like designs." 70 *Cong. Rec.* 67.

Senator Johnson did not claim that the two bills were identical — only that the broad "purposes" and "designs" were the same. Indeed, there were 36 differences between the terms of S. 728 and the provisions of H.R. 5773, twenty of which were significant, substantive differences.[23] Congress was aware of those differences and, where it believed that a provision of H.R. 5773 should be included in the final Act, the provision was reinserted in S. 728.[24] But Congress did not reinsert the deleted acreage limitation provision. And it did not do so, even though the absence of an acreage limitation provision in S. 728 was expressly brought to the Senate's attention after the substitution was made. *See* 70 *Cong. Rec.* 289.

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23. For instance, § 1 of S. 728 contained two provisions not in H.R. 5773, one requiring reimbursement of expenditures for the canal (LX-Q, p. 2, lines 11-13) and one providing that no charge was to be made for water for irrigation or potable uses (LX-Q, p. 2, lines 13-15). Conversely, § 1 of H.R. 5773 contained five provisions not in S. 728: a provision requiring application of state and municipal labor laws (LX-P, p. 2, lines 11-16), an elaborate acreage limitation provision (LX-P, p. 2, line 16 to p. 3, line 5), a provision requiring that plants be constructed only in states which had approved the Compact (LX-P, p. 3, lines 6-8), a provision requiring appointment of a Board of Engineers and Geologists (LX-P, p. 3, line 12 to p. 4, line 2), and a provision prohibiting any construction prior to approval of plans by such Board of Engineers (LX-P, p. 4, lines 2-7). The other sections of S. 728 and H.R. 5773 also had significant differences. *See* LX-P, p. 7, lines 15-17; LX-P, p. 8, lines 8-9; LX-Q, p. 6, line 25 to p. 7, line 8; LX-Q, p. 8, lines 1-12; LX-Q, p. 10, lines 15-17; LX-P, p. 11, lines 5-9; LX-P, p. 12, lines 8-13; LX-P, p. 12, line 14 to p. 13, line 2; LX-P, p. 13, lines 3-13; LX-P, p. 13, lines 15-18; LX-P, p. 15, lines 5-10; LX-P, p. 22, lines 8-10; LX-P, p. 22, lines 11-13.

24. For example, the House version of H.R. 5773 contained a provision requiring all § 5 contracts to conform to § 4(a) of the Act. LX-P, p. 8, line 9. This provision was not in the Senate bill that was substituted for H.R. 5773, but was put back into § 5 of the Act as passed. Similarly, the House version of H.R. 5773 contained a § 16 disclaiming denial of Mexican water rights. LX-P, p. 22, lines 11-13. This provision was deleted by the substitution of S. 728 but was put back as § 20 of the final Act.

C. Sparsity Of Comment About Acreage Limitation In The Legislative History Does Not Suggest A Congressional Intention To Apply Acreage Limitation.

The United States argues that it is reasonable to assume that "vigorous debate" would have attended the passage of any measure excluding Imperial Valley from application of acreage limitations, and that the absence of "vigorous debate" makes "it highly improbable that Congress intended the excess acreage limitation not to apply to Imperial Valley." U.S. Br. 47-48. The government's speculation proceeds from a hypothesis that is entirely at odds with the historical record of the state of mind of Congress in the 1920's. In point of fact, when Commissioner Mead, Congressman Swing and Senators Hayden and Ashurst observed that the Act would not impose acreage limitation, those statements evoked *no* debate, vigorous or otherwise. What *would* have evoked debate would have been any effort to break up Imperial Valley.

V. DENIAL OF FULL FAITH AND CREDIT TO THE *HEWES* JUDGMENT WOULD IMPOSE OBLIGATIONS UPON THE DISTRICT AND ITS LANDOWNERS WITHOUT THEIR CONTRACTUAL AND ELECTORAL CONSENT, CONTRARY TO FEDERAL AND STATE POLICIES REQUIRING SUCH CONSENT.

Federal law has always assumed that reclamation projects are consensual undertakings, and thus obligations imposed upon districts must be agreed to by contract. California law mandates even more stringent requirements of consent. In addition to requiring that contracts be approved by the district's directors, California law requires that contracts be approved by electoral vote. 1917 Cal. Stat. 245.

The obligations to which the District and its electors consented in 1932 were judicially confirmed in *Hewes v. All Persons*. Refusal to accord *res judicata* effect to the *Hewes* judgment would not only frustrate the public interest in maintaining the stability of *in rem* judgments, but would also make a travesty of the requirements of consent that

are contemplated by state and federal law. The Imperial Irrigation District would be forced at this late date to assume acreage limitation obligations to which it does not now consent, and to which it did not and would not have consented in 1932. Moreover, this would occur at a time when the opportunity of an alternative choice — use of the Alamo Canal — has been irretrievably lost. As for the landowners in the Valley, their rights to water and their rights and obligations *vis à vis* the District were supposed to be permanently fixed by the judgment in *Hewes*. Disregard of that judgment not only would deprive them of rights secured by judicial decree, but would do so without their electoral consent, in flagrant violation of California law.

Respondents do not deny, and cannot deny, that the foregoing consequences would flow from a denial of full faith and credit to the *Hewes* judgment. They ignore such consequences and make no argument purporting to justify disregard of the federal and state requirements of contractual and electoral consent. Instead, they assume, but do not show, that it would be "unjust" to abide by the 1933 state court judgment, and invoke various technical grounds which supposedly would permit circumvention of the *Hewes* judgment. None of these arguments has merit, but even if there were a technical ground which might provide an arguable basis for ignoring *Hewes*, invoking such technicalities could hardly be justified in view of the destruction of state and federal policies of contractual and electoral consent that would result.

A. The *Hewes* Case Was An Adversary Proceeding Entitled to Full Recognition.

On the basis of pure speculation, respondents suggest that *Hewes* was a "collusive" proceeding in which Malan and the District were not genuine adversaries. Res. Br. 148. The record provides no basis for such speculation and, to the contrary, establishes that Malan was a persistent adversary whose attacks on the contract were seriously intended and taken seriously by both the District and the Department of the Interior.

Even before the confirmation proceeding in *Hewes* was initiated, Charles Malan had been on the District's back, seeking to stop the contract. Malan initiated his own preemptive strike by filing a suit against the District, *Malan v. Imperial Irrigation District,* seeking to enjoin the directors of the District from taking any steps to carry out the contract. LX-AG; LX-AI. In that action, as he later did in *Hewes,* Malan attacked the contract in "a number of ways as being in conflict with the Reclamation Law," including its alleged violation of the 160-acre limitation laws. LX-AQ. Because of the federal issues raised, the District's counsel sought the aid of government counsel in defending the case. LX-AQ. After commencement of the *Hewes* case, there was so much concern about Malan's attack that two of the District's directors asked Commissioner Mead to dispatch Chief Counsel Dent to El Centro to assist in defense of the case. LX-AP. Of all the issues raised by Malan, the 160-acre limitation issue was the one on which the government's involvement and cooperation was the most direct, for the assistance of government counsel was sought "particularly in connection with the 160-acre limitation" question. LX-AQ.

During the trial, Malan and other objectors attacked "the contract from every conceivable angle," including the "160-acre limitation." LX-AL. After the taking of evidence, three full days of oral argument were presented before Judge Wilson in Los Angeles, followed by the filing of post-trial briefs. The Bureau's District Counsel advised Commissioner Mead that the attorneys for Malan and the other objectors continued to argue "every conceivable point in their attempts to have the contract declared invalid." LX-AX. "About the only features of the contract not attacked were the article numbers . . . ." *Id.*

Following the issuance of Judge Wilson's opinion on May 24, 1933, and the issuance on July 1, after hearing, of findings of fact and conclusions of law, Malan moved for a new trial, and his motion was denied on July 28. LX-BF. Malan appealed the *Hewes* judgment, and Malan's attorney even went so far as to send a copy of his brief to Secretary Ickes, pointing out the reasons for his belief that the "contract is illegal," including the acreage limitation question.

Even though the pendency of the appeal blocked any federal appropriations for construction of the canal (LX-BH), Malan refused to dismiss his appeal until late February 1934. LX-BM.

As made amply clear by the foregoing evidence in the record, *Hewes* was not a friendly test-suit proceeding in any sense. Respondents nonetheless assert that "it takes little imagination" to perceive that the proceedings were non-adversary. Res. Br. 148-49. That is true: one must ignore the record and rely upon *imagination* to conjure up such a theory.

B. The *Hewes* Court Properly Considered the Federal Statutes Affecting the Validity of the Contract.

While conceding that the *Hewes* court properly concluded that the All-American Canal Contract did not require acreage limitation, the government argues that the state court somehow exceeded its jurisdiction when it went on to consider whether this omission was proper under the applicable federal law. U.S. Br. 71. Such a restrictive notion of contract validation makes no sense. Clearly, if acreage limitations applied to Imperial Valley as the government now contends, federal law — § 46 — required that the *contract* provide for appraisal and disposition of excess lands. 43 U.S.C. § 423(e). Since the All-American Canal Contract contained no such provision, the *Hewes* court could validate the contract *only* by finding that acreage limitation did not apply. If it found that acreage limitation did apply, the *Hewes* court would have been required to invalidate the contract. Under California law, it could not imply into the contract conditions to which the parties had not agreed and which had not received electoral approval. Under either scenario, an interpretation of federal law was essential to a determination of validity.

The California Supreme Court's decision in *Metropolitan Water Dist. v. Marquardt,* 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rptr. 724 (1963), makes amply clear that where a contract is challenged because it does not provide for federal acreage limitation, that federal question must be adjudicated in order to determine the contract's validity. *Mar-*

quardt was a mandamus action brought under state law for the purpose of obtaining a judicial decree validating a contract between a state water agency and the Metropolitan Water District. The contract did not provide for acreage limitation, and one of the principal objections was that the contract had failed to include federally required acreage limitation, and was thus invalid. The California Supreme Court examined federal law in depth — like the *Hewes* court — and upheld the validity of the contract, holding that federal law did not require inclusion of an acreage limitation provision. *Id.* at 188-192.

In sum, there is no California or federal case holding that it is improper for a court to adjudicate acreage limitation questions or any other relevant federal issues in a confirmation proceeding brought under California's statutory scheme. All of the cases which have involved acreage limitation issues squarely contradict respondents' theory of California jurisdictional law.

C. Congress Has Not Reserved to Federal Courts Exclusive Jurisdiction to Decide Reclamation Law Questions.

Respondents argue that when Congress enacted a requirement in 1922 that reclamation contracts be confirmed in a "court of competent jurisdiction," Congress did not intend that state courts would adjudicate reclamation law questions. This argument mistakenly assumes that the Act of May 15, 1922 was a congressional grant of limited jurisdiction to state courts. In point of fact, the Act of May 15, 1922 is not a grant or limitation of jurisdiction at all, but merely a requirement for judicial confirmation before a "contract with an irrigation district . . . shall be binding on the United States." Whether a state tribunal, such as the *Hewes* court, "has competency to render a judgment in an action is a question of local law of the State in which the judgment is rendered." *Restatement, Judgments,* § 7 Comment a. The *Hewes* court plainly had such jurisdiction under the applicable California statutory law providing for confirmation proceedings. 1917 Cal. Stat. 245, § 3; 1897 Cal. Stat. 276, § 68; Cal. Water Code §§ 23225, 22670.

Moreover, except in instances where Congress has expressly restricted jurisdiction to federal courts, state courts have concurrent jurisdiction with federal courts to determine issues arising under federal statutes. *Grubb v. Public Utilities Comm'n,* 281 U.S. 470, 476 (1930).

When Congress provided in the Act of May 15, 1922 that irrigation district contracts be "confirmed by decree of a court of competent jurisdiction," there would have been no doubt that federal questions arising under the reclamation laws could be adjudicated in the required confirmation actions. State-court confirmation proceedings to validate contracts entered into by the Secretary of the Interior and irrigation districts had been the accepted practice for more than a decade when Congress passed the Act of May 15, 1922. These state court confirmation proceedings involved adjudications of issues of federal law, such as the Secretary's authority under the Act of 1902. *See McLean v. Truckee-Carson Irr. Dist.*, 49 Nev. 278, 245 Pac. 285, 288-289 (1926); *Nampa & Meridian Irr. Dist. v. Petrie,* 28 Idaho 227, 153 Pac. 425, 429-30 (1915); *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 Pac. 663 (1913); *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 Pac. 382, 383 (1913). The congressional debates and reports which accompanied the 1922 Act made clear that Congress contemplated that state courts would perform the validation function just as they had been doing in the past. 62 *Cong. Rec.* 3574; *H. Rep. No. 622,* 67th Cong. 2d Sess. 5, 7.

D. "Intervening Events" Provide No Justification For Denying the *Hewes* Judgment Its Proper *Res Judicata* Effect.

The United States argues that since 1933 there have been "several legal developments" which create an altered situation warranting denial of any *res judicata* effect to the *Hewes* judgment. U.S. Br. 73; *see also* Res. Br. 159-62. The "intervening" developments cited by the United States are this Court's decisions in *Ivanhoe, Arizona v. California* and *California v. United States.* None of these decisions announced "a change in the law" as applicable to the Boulder Canyon Project Act or the Imperial Irrigation District Contract. As previously shown, the principles explicated in

Ivanhoe are not contrary to the judgment in *Hewes*. Nor is there any inconsistency between *Hewes* and the principles articulated by this Court's decisions in *Arizona v. California* and *California v. United States*.

The "intervening change of law" theory upon which the United States and respondents rely has never been applied to defeat the primary *res judicata* impact of a final judgment. To the contrary, that theory is a discrete rule which in narrow circumstances creates an exception only to collateral estoppel, not to primary *res judicata*. *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948). The rule, as stated in § 70 of the Restatement of Judgments, is as follows:

> "Where a question of law . . . is litigated and determined by a final personal judgment, the determination is not conclusive . . . in a subsequent action on a different cause of action, except where both causes of action arise out of the same subject matter . . ."

By its very terms, such a rule is inapplicable in this case. Section 70 applies only where a prior action resulted in a "personal judgment," whereas *Hewes* was an *in rem* judgment. Section 70 applies only where the subsequent case involves a "different cause of action," whereas respondents' claim here is the same one litigated in *Hewes*. And even where different causes of action are involved, § 70 cannot apply if both arise out of the "same subject matter," which is obviously the situation here.

Turning to *res judicata* in its primary sense, the law is clear that a final judgment like *Hewes* cannot be ignored because of a subsequent change in law. The California Supreme Court emphatically rejected such an idea in *Slater v. Blackwood*, 15 Cal. 3d 791, 796, 126 Cal. Rptr. 225, 543 P.2d 593 (1975):

> " 'In every instance where a rule established by case law is changed by a later case the earlier rule may be said to be "mistaken" . . . . *Such "mistakes" or "injustices"* are *not a ground for equity's intervention.* So to hold would be to emasculate, if not wipe out, the doctrine of res judicata because the doctrine is most frequently applied to block relitigation based upon contentions that a law has been changed. . . .'
>
> ". . . It cannot be denied that judical or legislative action which results in the overturning of established legal principles often leads to seemingly arbitrary and unwarranted distinctions in the treatment accorded similarly situated parties. However, '[p]ublic policy and the interest of litigants alike require that there be an end to litigation.' (*Panos v. Great Western Packing Co., supra,* 21 Cal. 2d 636 at p. 637.) The result urged by plaintiff, to borrow the language of Justice Traynor's dissent in *Greenfield,* would call '. . . into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case.' (*Greenfield v. Mather, supra,* 32 Cal. 2d at p. 36.) The consistent application of the traditional principle that final judgments, even erroneous ones (*Busick v. Workmen's Comp. Appeals Bd., supra,* 7 Cal. 3d 967 at p. 975; Rest., Judgments, § 47, com. b), are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case." *Id.* at 796-97.

This Court's decision in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940), shows the same disfavor under federal jurisprudence toward attempts to circumvent final judgments on a theory of "changed law." As the Court stated in *Chicot,* where rights have been finally adjudicated and reduced to a judgment, that "past cannot . . . be erased by a new judical declaration." *Id.* at 374.

VI. CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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March 17, 1980.

APPENDIX: Memorandum of Solicitor General Griswold, April 8, 1971, reprinted from 126 *Cong. Rec.* S. 1632-33 (daily ed. Feb. 20, 1980).

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OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. April 8, 1971.
MEMORANDUM FOR THE FILES

Re United States v. Imperial Irrigation District, et al., No. 67-7-T S.D. California.

I have concluded not to authorize an appeal in this case.

Since this conclusion is contrary to the recommendation of Assistant Attorney General Kashiwa of the Lands Division, and is contrary to the recommendation of three members of my own staff, it is incumbent on me to write this memorandum expressing the reasons for my conclusion. The Solicitor of the Department of the Interior has recommended against appeal, although he gives no reasons for his conclusion.

It is also appropriate to note that various types of pressures have been circulating about including items received in the mail, columns by Jack Anderson, and others. With great care, and to the best of my ability, I have tried to be indifferent to these pressures, and to decide the question (which it is my duty to decide) strictly on the merits. I have tried to approach the problem as a lawyer, and as a Solicitor General, responsible on this matter at this point for the sound administration of justice and of governmental action.

1. Irrigation in the Imperial Valley was originally a private enterprise. On this basis the Valley grew and developed. By the early 1920's, the irrigated area had reached virtually its full extent.

2. The Boulder Canyon Project Act did not make possible the reclamation of any appreciable amount of land in the Imperial Valley. The land had already been reclaimed. The Boulder Canyon Project Act, by providing for the All American Canal, did provide for a more stable water supply for the Valley, by eliminating the risks of taking the water through Mexico; and it provided protection against the considerable risk of flooding with which the Valley had long been threatened. There is no doubt that this was a benefit to the Valley. Except in a very broad sense, though, it did not amount to reclamation. It helped to protect reclamation which had already occurred under private enterprise, but it did not make possible the cultivation of any appreciable number of additional acres.

3. Of great importance is the fact that there were already large land holdings in the Imperial Valley at the time the Boulder Canyon Project Act was adopted. By the late 1920's, the Valley had for many years been probably the most intensively farmed area in the United States. It was, indeed, the source of a large amount of fresh produce marketed all over the country. Much of this was produced on large land holdings. The Imperial Valley had never been a "homesteading" area. It had long been an area where large scale farming was conducted although there were some smaller farms, too.

4. It may well be that Congress could have provided that the improvement resulting from the construction of the All American Canal should be made only on condition that all large holdings be broken up, and that land holdings thereafter be limited to 160 acres. There is certainly nothing in the statute which says this expressly. As I have already indicated, the situation was not akin to the usual reclamation project, which brings new land into cultivation, and can appropriately provide that its benefits should be widely shared among small land holders. Here the Imperial Valley was already well established, and functioning on a very large scale, with many large holdings. It is, it seems to me, a rather different thing to say that large holdings must be broken up than it is to say that large holdings shall not be formed in a new development.

5. I recognize fully that arguments can be made on the basis of the statutory provisions, particularly those referring to "the reclamation laws," that the proper construction of what Congress did is that land holdings in the Imperial Valley should be reduced to 160 acres, in effect, retroactively. Arguments can be made the other way, too. On either basis, the arguments are extremely technical and

complex. Neither conclusion can be said, in my judgment, to be clear or "required" as a matter of ordinary principles of statutory construction.

6. Similarly, the legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction that any of these items of legislative history have any close relation to the statute as it was finally enacted. The one thing that can be said about the statute passed by Congress is that it contains no express provision on this question and that the arguments that can be made about it, by reference to other statutes, and so on, are complex, and not very convincing.

7. In this situation, we have what seems to me to be the determinative factor in this case. This is the announcement made by the Secretary of the Interior, Ray Lyman Wilbur in February, 1933. This was to the clear effect that the 160 acre limitation was not applicable in the Imperial Valley, for the reason that no new water was being sold under the All American Canal project.

This was a clear and specific administrative determination, contemporaneously made by the officers charged with the administration of this statute. As far as I can determine, it did not cause a ripple at the time, and it was not seriously questioned in Congress, or elsewhere. Indeed, there was a local court decision confirming it. I do not put much stress on that, but it is a part of the picture which shows that this question was determined in 1933, that it was long regarded as settled, and that many actions were taken in reliance on it.

One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute in-

volved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision.

It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon.

8. To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years, and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, including commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination.

To me, the controlling factor in this case is the determination of Secretary Wilbur in February, 1933. This was later confirmed by Secretary Krug in 1948. I do not think that it is sound, 38 years later, to be presenting serious questions about that action. Whether it was right or wrong, it was made; and such an administrative determination on a question at least doubtful should be sustained after a lapse of 38 years.

9. I have given careful consideration to the question whether, agreeing that the underlying questions here are arguable, an appeal should not be authorized simply for the purpose of obtaining a decision of an appellate court on an obviously important matter. Indeed, that would be the easy way out; and it has been tempting. I have given consideration to the question whether I am leaning over backwards. However, I have come to the conclusion that it is not appropriate for me, on this matter, simply to say that it is a doubtful question, and so it should be decided by the court of appeals.

The responsibilities of the Solicitor General cannot be described in a few words. If he authorized appeals in every case where the question was doubtful, a great many more government appeals would be taken than in fact are taken. It is very clear that the Solicitor General is an advocate and not a judge. However, he is a very special sort of advocate. He has a responsibility with respect to government litigation, and he is expected to exercise some control over it, so that cases are not presented simply for the purpose of getting a decision. He has some responsibility in some cases to see that cases are not presented which should not be presented, that cases are not presented where the government's position is, on his best analysis, not one which the government should be interested in.

For the reasons I have already given, this seems to me to be such a case. No matter where I look and turn, I cannot get away from the administrative decision which was made, by officers having responsibility in the area, in February 1933, now 38 years ago. I would not say that it is a breach of faith or a breach of trust for the government to seek to change that decision. I have concluded that, in my judgment, it simply is not good government and that it is not a position which, in the particular circumstances of this case, the United States should be advancing before a court.

In summary, it is not just that I think an appeal to the Ninth Circuit Court of Appeals would be unsuccessful, but that I think that it ought to be unsuccessful. In such circumstances, it does not seem to me appropriate to authorize an appeal.

10. It is clear that there are many defects in the opinion of the district court in this case. It misquotes the statute, and makes other errors. I do not think, though, that these are really very significant. In particular, I do not think that they have the significance which is attached to them in the long memorandum from Mr. Kashiwa. It remains the fact that there is nothing really explicit in the statute, and that the statutory provisions require a good deal of rather involved reading together to support the government's

position — a reading together which essentially ignores the special and unusual situation and background of the All American Canal project.

The opinion likewise has some rather sweeping language which might be regarded as having some general effect on the application of the reclamation laws to other projects. It is suggested that there should be an appeal for the purpose of getting this language qualified or disapproved, even if the appeal did not lead to any different result with respect to the Imperial Valley. I am not able to conclude that this is an adequate basis for an appeal. In the first place, these portions of the opinion of the district court are dictum at most, with respect to other projects, and they are rather clearly dictum. I do not think that the precedent will be of any serious moment in subsequent cases involving other areas with different histories and backgrounds. In the second place, I do not think it is appropriate to take an appeal simply for the purpose of getting an opinion limited or corrected, if we think the court reached the right result. Since I think the court here did reach the right result, because of the long continued administrative practice, I do not think that the undue breadth of the opinion is an adequate basis for appeal.

11. In reaching this conclusion, I have sought to consider only the merits of the controversy, and to focus my examination on the responsibilities of this office for the proper handling of government litigation.

For the reasons indicated, however, after full and careful consideration, I have come to the conclusion that there should be no appeal in this case.

ERWIN N. GRISWOLD,
Solicitor General.

IN THE

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OCTOBER TERM, 1979

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TABLE OF AUTHORITIES CITED

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Arizona v. California, 373 U.S. 546 (1963) 52, 53, 54

Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522 (1931) 79

Bernhard v. Bank of America, 19 Cal.2d 807 (1942) 65

Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334 (1891) 66

California v. United States, 438 U.S. 645 (1978) 26

Chern v. Bank of America, 15 Cal.3d 866 (1976) 72

City of New York v. New York N.H. & H.R. Co., 344 U.S. 293 (1952) 78

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948) 75

Cromwell v. County of Sac, 94 U.S. 351 (1877) 65

Davis v. Davis, 305 U.S. 32 (1938) 79

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Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) 81

Grandview Dairy v. Jones, 157 F.2d 5 (2d Cir. 1946) 75

Greenfield v. Mather, 32 Cal.2d 23 (1948) 71

Guardianship of DiCarlo, 3 Cal.2d 225 (1935) 71

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Hight v. Hight, 67 Cal.App.3d 498 (1977) 71

Israel v. Morton, 549 F.2d 128 (9th Cir. 1977) 2

Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal.2d 692 (1960) 66

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King v. Smith, 392 U.S. 309 (1968) 49

Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control, 57 Cal.2d 749 (1962) 72

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Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968) 77
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Shaffer v. Heitner, 433 U.S. 186 (1977)..... 77
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).....13, 64
State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 124 (1945)..... 76
State of California v. Rank, 293 F.2d 340 and 307 F.2d 96 (9th Cir. 1961), *aff'd in part and rev'd in part sub nom Dugan v. Rank,* 372 U.S. 609 (1963)..... 2
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United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977) 2, 59, 60, 73
United States Imm. and Nat. Service v. Hibi, 414 U.S. 5 (1973) 81
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FEDERAL STATUTES

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Congressional Hearings and Reports	
U.S. Senate Report No. 95-180, 95th Cong., 1st Sess. (1977)	46
U.S. Senate Report No. 139, 63rd Cong., 2d Sess. (1913)	29
U.S. Senate Doc. No. 446, 57th Cong., 1st Sess. (1902)	3
Cong. Globe, 35th Cong., 1st Sess. (1858), p.	
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Cong. Globe, 35th Cong., 2d Sess. (1859), p.	
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66 *Cong. Rec.*, 68th Cong., 2nd Sess. (1925), p.	
3449	35

Pages

Legislative Material

Powell, J. W., *Report on the Land of the Arid Region of the United States,* H. Exec. Doc. 73, 45th Cong., 2nd Sess. 39, 40

Report of the Public Lands Commission, H. Exec. Doc. 46, 46th Cong., 2nd Sess. (1880) 40

Federal Reclamation by Irrigation, S. Doc. No. 92, 68th Cong., 1st Sess. (1924) 44

"Role of Giant Corporations: Hearings of the Subcommittee on Monopoly of the Senate Select Committee on Small Business," 92nd Cong., 1st & 2d Sess., parts 3, 3A, and 3B (1971-72) 58

"Small Business and the Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations," Sen. Comm. Print No. 13, 79th Cong., 2nd Sess. (1946) 57

Government Publications—Federal

U.S. Dept. of Agriculture, *Land Ownership and Operating Terms in Imperial Valley, California* (1942) 49

....., Economics, Statistics, and Cooperatives Service, "Statutes of the Family Farm: Second Annual Report to the Congress," Agricultural Economic Report No. 434 (1970) 49

....., Economics, Statistics, and Cooperatives Service, "The U.S. Dept. of Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis," Feb. 1978 ..... 47, 48, 56, 77

U.S. Dept. of Interior, *The Hoover Dam Power and Water Contracts and Related Data* (1933) 54

....., Bureau of Reclamation, *Landownership Survey of Federal Reclamation Projects* (1946) 43

....., Opinion of the Solicitor, M-36919, 86 I.D. ..... (Dec. 6, 1979) 43, 58

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....., ..., M-33902, 71 I.D. 496, App. H 73

Pages

Government Publications—State

California Employment Development Department, "The Family Farm In California: Report of the Small Farm Viability Project" (1977) 56, 57

County Supervisors Association of California, *California County Fact Book* 1976-77 47

Legal Treatises, Journals and Socio-Economic Materials

Ackerman, B., *Private Property and the Constitution* (1977) 49

Benedict, Murray R., *Farm Policies of the United States, 1790-1950, A Study of Their Origins and Development* (1953) ..... passim, Part I

Blair, J. M., Economic Concentration—Structure, Behavior, and Public Policy (1972) 58

Bosselman, F. *et al., The Taking Issue—An Analysis of the Constitutional Limits of Land Use Control* (1973) 49

Boyd, *The Papers of Thomas Jefferson* (1950) 20

Clark, R., editor, *Water and Water Rights* (1967) 35

Eddy, *Colleges for Our Land and Time* (1956) 29

Fellmeth, R. C., *Politics of Land* (1973) 3

Fuller, Lon L., "Irrigation and Tyranny," 17 STANFORD L. REV. 1021 (1965) 3

Gates, Paul W., *History of Public Land Law Development* (1968) ..... passim, Part I

Hofstadter, R. *The Age of Reform* (1955) 32

Hundley, N., Jr. *Water and the West* (1975) 54

Koch, A. and Peden, W. (ed.), *The Life and Selected Writings of Thomas Jefferson* (1944) 20, 21

Note, "Developments—Res Judicata," 65 HARV. L. REV. 818 (1952) 69

Peffer, E.L. *The Closing of the Public Domain, Disposal and Reservation Policies, 1900-50* (1951) 36

Restatement of Judgments, Second, § 45 (Tent. Draft No. 1, 1973) 65

Restatement of Judgments, Second, § 68 (Tent. Draft No. 1, 1973) 69

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Restatement of Judgments, Second, § 68.1 (Tent. Draft No. 4, 1977) 68, 72, 77
Restatement of Judgments, Second, § 73 (Tent. Draft No. 1, 1973) 68, 69
Sands, C.D. *Sutherland Statutory Construction* (4th ed. 1972-75) 16
Schafer, J., *The Social History of American Agriculture* (1936) 19
Smith, T.L. "A Study of Social Stratification in the Agricultural Sections of the U.S.," 34 *Rural Sociology* 496 (1969) 56
Stewart, R. "The Reformation of American Administrative Law," 88 HARV. L. REV. 1667 (1975) 60, 61
Stone, Christopher, *Where The Law Ends* (1976) 10
Taylor, Paul S., *Mexican Labor in the United States, Imperial Valley* (Univ. of Calif. Press [1930] and Johnson Reprint Corp. [1966]) 56
....., "The Excess Land Law: Execution of a Public Policy," 64 YALE L.J. 477 (1955) 15, 32, 40, 41, 42, 43, 59
....., "Excess Land Law: Calculated Circumvention," 52 CALIF. L. REV. 978 (1964) 3
....., *Mexican Migration and the 160 Acre Limitation* 63 CALIF. L. REV. 732 (1975) 55, 56
....., "Water, Land, and Environment, Imperial Valley: Law Caught in the Winds of Politics," 13 NATURAL RESOURCES L.J. 1 (1973) 49
....., "Public Policy and the Shaping of Rural Society," 20 SOUTH DAKOTA L.REV. 475 (1975) 26
Teele, R., *The Economics of Land Resolution in the United States* (1927) 37
Transactions of the Commonwealth Club (1912-13) 4
Tribe, L., *American Constitutional Law* (1978) 60, 61, 62
Warriner, Doreen, *Land Reform in Principle and Practice* (1969) 46
Watkins, T. H., *California: An Illustrated History* (1978) 26

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"Everybody knows that the West is the Land of Little Rain, the arid country, where land will not grow crops unless it is irrigated, where water has exactly the value of blood."

Bernard DeVoto, *Harper's Magazine*, Oct. 1951, at 73.

INTRODUCTION

Amici address the social, economic, and legal context of this unusual case. Only rarely has the Court scrutinized the legal interface of water and the arid country which is the object of the general reclamation laws in the seventeen[1] Western states. Because of the special expertise[2] which *amici* marshal upon the origins and viability of family-sized agriculture as a national imperative and the direct consequences of this Court's decision on the lives of members and clients of *amici* organizations, the following brief is respectfully submitted. It is filed without a motion, as is permitted by Rule 42(2) of this Court, the prior consent of the parties having been obtained. Those letters of consent are being sent directly by the parties to the Clerk of the Court.

INTEREST OF THE AMICI

Amicus Pedro Duarte and Antonia Casarez reside in the Imperial Valley and would like to purchase excess lands

1. Various sources use conflicting numbers, the correct count is seventeen as Texas was added to the original sixteen in § 1 of the Reclamation Act of 1902 (Ch. 1093, 32 Stat. 388) by the Rio Grande Reclamation Project Act, Ch. 798, 33 Stat. 814 (1905).

2. While amici have gone to original legislative materials as well as established works of academic scholarship, much of the groundwork in this brief was first laid or foreshadowed in the accumulated adjudications of the U.S. Court of Appeals for the Ninth Circuit which has with great deliberation and consistency reviewed the sundry aspects of the reclamation laws and ordered fulfillment of the family-sized farm protections of these laws. *State of California v. Rank,* 293 F.2d 340 and 307 F.2d 96 (1961) (per Hamlin and Merrill with District Judge Powell) aff'd in part and rev'd in part *sub nom Dugan v. Rank,* 372 U.S. 609 (1963); *Turner v. Kings River Conservation District,* 360 F.2d 184 (1966) (per Hamlin, Browning, and Duniway); *U.S. v. Tulare Lake Canal Company,* 535 F.2d 1093 (1976) (per Browning, Duniway, and Wallace), *cert. denied* 429 U.S. 1121 (1977); *Israel v. Morton,* 549 F.2d 128 (1977) (per Merrill and Kennedy with District Judge Enright).

currently benefitting from project water. Their interest is thus the same as respondent Yellen, respondent Miranda, a farm labor contractor, and the 121 farmworkers who have preserved and pursued this action to enforce § 46 of the Omnibus Adjustment Act of 1926 through § 14 of the Boulder Canyon Project Act of 1928.

Professor Paul S. Taylor has aptly characterized the crux of *amici's* interest in this case:

> Federal reclamation began as a program to help "farm boys" who "want farms of their own" obtain them "without being driven into the already overcrowded cities to seek employment."[3] Begun as a turn-of-the-century "war on poverty," reclamation is administered currently on important projects in apparent forgetfulness of the purpose [footnote omitted] On these projects it has become a program largely to subsidize reclamation of great landholdings primarily for the benefit of their owners.[4]

Counsel for Duarte and Casarez serve a client community, through twelve offices located in rural California. That community is comprised of a low-income population of one and one-half million people, a large proportion of which are employed in agriculture. Their immediate economic handicap is exacerbated by the very limited prospect of breaking into the pervasive pattern of large scale agricultural landholdings.[5] One of CRLA's offices is located in El Centro in the Imperial Valley. Many CRLA clients in addition to Duarte and Casarez would like to acquire excess lands.

3. Quoting Congressman Oscar W. Underwood, of Alabama. S. Doc. No. 446, 57th Cong., 1st Sess. 21 (1902).

4. *Excess Land Law: Calculated Circumvention,* 52 CALIF. L.REV. 1978 (1964).

5. *See generally* R. C. Fellmeth, *Politics of Land* (1973) and Lon L. Fuller, *Irrigation and Tyranny,* 17 STANFORD L.REV. 1021 (1965).

Ex-president Theodore Roosevelt in 1911 explained his signing the Reclamation Act of 1902 as being motivated by a desire to preserve and continue our democratic system by guaranteeing the "freedom of opportunity" for the "have-nots" to become landed.[6]

The statutorily-mandated opportunity to acquire excess lands will remain unfulfilled in the Imperial Valley unless the Ninth Circuit decision in favor of respondents is upheld. Thus on behalf of Pedro Duarte and Antonia Casarez, who like respondents are at present "have-nots," CRLA files this brief.

Amicus CALIFORNIA AGRARIAN ACTION PROJECT, INC., is a non-profit corporation organized under the laws of California, *inter alia,* to aid small-scale, family farmers; to promote organization of farmers' markets (wherein farmers sell their products directly to consumers) and consumer cooperatives; and to provide relief to the poor, distressed and disadvantaged people of rural California. The members of the project include small family farmers, taxpayers, and other rural persons who are vitally interested in the outcome of this action in that their lives and their economic and personal well-being are and have been directly affected by the resistance to the law of petitioners herein. The Project joins as *amicus* on behalf of its members.

Amicus Mexican American Political Association (MAPA) is a non-profit, non-partisan, volunteer, grassroots political organization dedicated to the advocacy of Hispanic issues.

MAPA was founded in Fresno, California in 1960 and for twenty years has played a seminal role. Among mat-

6. 7 *Transactions of the Commonwealth Club* 108 (1912-13).

ters of concern to MAPA has been reapportionment, voter registration, and the pervasive low-economic status of many Hispanics. Presently MAPA has thirty-five chapters in California and a total statewide membership of approximately 5000 individuals. In July, 1979, the MAPA general assembly voted to expand its scope nationwide and organizing drives are currently underway in several other states.

One of MAPA's chapters is in the Imperial Valley and prominent among their concerns has been the concentration of agricultural landholdings in violation of federal reclamation law.

MAPA has long employed the courts as well as other forums to advance the interests of its members and the Hispanic population at large. Thus joining as *amicus* in this brief is consistent both with MAPA's practices and principles.

Amicus Consumer Federation of America (CFA) is the nation's largest consumer membership organization, composed of more than 200 national, state, and local groups who have joined together to advance the consumer viewpoint. That membership includes grassroots consumer organizations, senior citizens, rural, labor, cooperative, and similar groups.

CFA has often appeared before this Court to advance the interest of consumers.The decision on standing by the Ninth Circuit represents, in the view of CFA, a proper holding for access to the federal courts, especially on an issue of such complexity and social impact. It is one of the principles of CFA to support the family-sized farm in American society. It seems plain that the intent of the reclamation law is to provide for that reality in the Imperial Valley of California which as a result is one of the prime agricultural areas in America. Moreover, such a change in the scale of

agriculture there, may reasonably be expected to have market place dividends for consumers in food quality, price, and choice.

Amicus Access to Justice Project of the National Legal Aid and Defender Association (NLADA) joins respondents in asserting their standing (Part IV, section A of this brief) to intervene and prosecute this action. The NLADA is a private non-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of legal services agencies and public defender offices throughout the United States. NLADA also includes 2000 individual members most of whom are private practitioners. The Access to Justice Project within NLADA was created to work on behalf of the clients of NLADA's members toward insuring that all people will have equal and meaningful access to the federal courts. The Project is particularly concerned that the courts reach the merits of significant statutory questions such as are raised in the case at bar. It believes that the respondents present a clear "case or controversy" as is required by Article III and that the decision of the Ninth Circuit should be affirmed.

Amicus Mexican-American Legal Defense and Education Fund, Inc. (MALDEF) was founded in 1968 as a non-profit corporation under the laws of the State of Texas and is headquartered in San Francisco, California. Its principal purpose is to secure the civil rights of persons of Mexican descent through litigation and education.

In its efforts to assist the Mexican-American community to achieve its rights under the law, MALDEF has been involved in litigation which has challenged the traditional barriers facing Mexican-Americans: abridgment of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices;

unequal distribution of public services; and law enforcement misconduct.

MALDEF has extensive knowledge of the myriad ways in which the enforcement of laws continues to function to keep Mexican-Americans on the lower rung of the economic ladder.

Thus, MALDEF has an interest in the case at bench which not only centers on the enforcement of federal law but relates to the interests of a sizable portion of Mexican-Americans who make up the residents of the Imperial Valley. The failure to enforce federal reclamation law has had, and continues to have a negative impact upon the economic, social and political interests of this large Hispanic community. In many ways this impact has contributed to their alienation from the dominant society of the Valley. This failure to enforce the law not only amounts to a repudiation of the importance of Mexican-American ownership of property, but also undermines the concept of the public interest as it relates to compliance with federal law.

Over the years, the landless class in the Imperial Valley has primarily been comprised of Mexican-Americans. Because of the broad policy implications in this proceeding, the court's action may well signal the attention of Mexican-Americans for the opportunity to acquire land for farming and other economic endeavors.

Even more significant, judicial recognition that access to land in the Imperial Valley can be attained by Mexican-Americans will encourage the Hispanic community throughout the Southwest to elsewhere study and protest the lax enforcement of the law as respondents have done in the Imperial Valley. For these reasons, MALDEF joins in this brief.

Amicus Public Advocates, established in 1971, is a nonprofit public interest law firm incorporated in California and based in San Francisco. It provides ongoing legal counsel to more than seventy client groups including Black, Chicano, and Filipino associations; handicapped, senior citizen, prisoner, consumer, and womens' organizations.

As an active agent in the interest of consumers, Public Advocates has sought improved food safety, quality, and distribution in California. They have been brought to recognize, through their consumer as well as other clients, the skewed land ownership patterns in California's agricultural areas, especially the Imperial Valley. Additionally the economic and equitable rationale for family-sized agriculture has become clear. Also clear is the need for greater economic self-determination for these historically underrepresented groups. This case promises enhanced opportunities for at least some of their clients, particularly the growing Hispanic population of California. Consequently, toward these ends, Public Advocates joins in this brief.

Amicus United Farm Workers of America, AFL-CIO (UFW) is an unincorporated association chartered by the American Federation of Labor—Congress of Industrial Organizations in 1973. The UFW's purpose is to unite all farm workers under the union's emblem; to negotiate contracts to improve the wages, hours, and working conditions of farm workers; to safeguard the right of farm workers to strike or boycott; to engage in political activity which will advance the welfare of farm workers; and to guarantee to every farm worker the dignity and freedom which are the right of every human being.

Many members of the UFW, residents of the Imperial Valley who now work but do not own the land, would benefit directly from enforcement in this case of the acreage

limitation provisions of the reclamation laws. They could and would become owners of lands within the Imperial Irrigation District when excess lands now in the hands of large farm operators became available.

A large portion of the UFW membership, especially in the Imperial Valley which borders on Mexico, is of Mexican-American heritage. Economic opportunity for these citizens of the Valley depends on the rich agricultural production of its land. That production, in turn, would be impossible without the Colorado River water brought to the Valley through the All-American Canal. Those who own land, rather than simply work the land as employees for others, stand to gain the most economically from present nonenforcement. Few of the large Mexican-American population, including members of the UFW, have found opportunities to make the transition from tillers of the soil to owners, largely because land has become concentrated in the hands of a few. It is with the hope of ending this monopoly of the soil by breaking up large holdings, to give its members the chance to become small farmers, that the UFW joins this brief.

STATEMENT OF THE CASE[7]

Amici adopt by reference the statement of respondents.

There is a legal aphorism of great vintage in our Anglo-American legal system. Despite its deep historical roots, it

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7. The three petitioners in this cause—the Bryant class of excess landowners, the State of California, and the Imperial Irrigation District—will be referred to jointly unless otherwise specified. Additionally, the abbreviation conventions of *amici* will be: "CR" for the Clerk's Record; "Tr." for the trial transcript; "L.Br." for the Brief of the Landowner Petitioners; "L.App." for the Landowners' Appendix; "S.Br." for the Brief of the State of California; "Dist.Br." for the Brief of the Petitioner Imperial Irrigation District; "Dist.App." for the District's Appendix; "Con.App." for the Consolidated Appendix; "LX—" for the landowners' trial exhibits; "Pl.Ex." for the government's trial exhibits.

is of remarkable simplicity—no case holding is any broader than the narrowest reading of its facts. Recognizing that their decisions may have far-reaching and unintended consequences, our American appellate courts have long paid heed to this principle.

The factual background of these three consolidated petitions is of profound complexity. Respondents' statement of the case cannot be studied too closely by this Court. The landowner and District briefs elide too many factual linchpins.

Professor Christopher Stone has recently decried the law's limitations in solving many pressing societal problems: "In many cases lawmaking is an unsatisfactory way to deal with social problems not because of a lack of 'facts' . . . but because we, as a society, lack consensus as to the values we want to advance."[8]

But that is not the case at bar. Herein the values of family-sized agriculture are deeply and firmly rooted in a long chain of statutory enactments. They leave no doubt as to the values which Thomas Jefferson, among others, instilled. Neither can there be serious doubt about their currency and vitality in American agriculture.

But from those given premises, what most forcefully argues for affirmance of the Ninth Circuit's decision is the factual predicate of improper and immense governmental largess to excess landowners in the Imperial Valley, at the expense of those who are the Congressionally-intended beneficiaries of the mandate for family-sized farms.

SUMMARY OF ARGUMENT

I. The Family-Sized Farm Objects of Congress.

From the earliest days of the Union, our founding fathers and national legislators have demonstrated their preference for a land policy for our immense resources which would

8. *Where The Law Ends* 97 (1976).

favor family-sized farms, opportunities for the influx of immigrants who would live and work on their own land. Through numerous legislative acts, Congress has woven a fabric of interconnected farm and land policy, of which the reclamation acts for the West are a crucial thread. Cumulatively these congressional acts form a legal and historical context within which this Court must view enforcement of § 46 of the Omnibus Adjustment Act of 1926 and the Boulder Canyon Project Act.

The acreage limitation is the major tenet of the family-sized farm principle. Such egalitarian farming opportunities have been made possible through federally financed projects such as the Hoover Dam and the All-American Canal bringing water to the Imperial Valley. The test of changing times—economic as well as political—and the persistent, expanding investment in family-sized farming opportunities by the federal government is a record of commitment to a fundamental social value. It reflects a recognition that wealth (including land and water) concentration in the hands of producers is economically inefficient as well as socially inequitable.

II. Application of the Pervasive Continuity of Legislative Purpose.

Petitioner landowners are not the family-sized farmers whom consistent, congressional legislation has sought to nurture as a national social value. Rather, the trial record and the government's official statistics on Imperial Valley agriculture show that these petitioners are unusually large landowners.

Landowner petitioners may not claim a right to subsidized water on the theory of "present perfected rights" or under California law. Only the District's rights as trustee for the owners—not the landholders as individuals—need

be satisfied under § 6 of the Project Act and Article VIII of the 1922 Colorado River Compact. If a "taking" occurs, the landowners' remedy is elsewhere than in this action.

Landowners mistakenly focus on bits and snatches of the legislative history of the Boulder Canyon Project Act to assert that § 14, as it was finally enacted, excludes enforcement of the acreage limitation on lands in the District. This Court should instead, mindful of the pervasive legislative context set out here, uphold the acreage limitation.

III. Enforcement will cause neither chaos nor inequity.

Indeed, it will foster the type of prosperity originally intended by Congress i.e. prosperity of opportunity for the family-sized farmer. Without the federally subsidized water brought to the Imperial Valley by constructing the Boulder Canyon Project, residents of the valley—to say nothing of the large owners directly benefitting—would not have flourished. It is not improper that Congress should require that their prosperity, gained through expenditure of millions of taxpayers' dollars, be eventually shared. The acreage limitation will break up the monopoly excess landowners now have and finally create opportunities for family-sized farm prosperity.

IV. Petitioners' Procedural Pleas Are Without Merit

A. RESPONDENTS HAVE STANDING TO ENFORCE § 46

As direct beneficiaries of the acreage limitation principle of reclamation law, respondents are injured by the District's failure to deny water to excess landholders who refuse to enter into recordable contracts. As residents of the Imperial Valley, recent Department of Interior regulations propose to give them priority as beneficiaries of § 46 implementation. The "ex-contract" sales prices of excess lands would bring them within the economic reach of respondents and those lands are clearly identifiable. To satisfy Constitutional as well as prudential requisites for standing, respondents need not demonstrate that particular properties on specific terms are being denied them. Rather, as here, they must and do show that giving effect to § 46 is the *sine qua non* to their claims. *Warth v. Seldin* and *Simon v. Eastern Kentucky Welfare Rights Organization* are inapposite as there essential parties were not present and subject matter properties were not identified.

B. COLLATERAL ESTOPPEL DOES NOT PRECLUDE RESPONDENTS

The procedural barrier, if any, is collateral estoppel not *res judicata*. The *Hewes* superior court determination was against matters raised by Malan in his answer. The acreage limitation issue of the case at bar was outside the issues framed in the *Hewes in rem* confirmation complaint. Respondents, of course, are barred and do not seek to challenge the validity All-American Canal contract tested in *Hewes*. But as non-privies, non-class-related parties to Malan, respondents are not precluded (as Malan and his successors are) from now seeking enforcement of § 46. Moreover, exceptions to the application of collateral estoppel are present. It would defeat the ends of justice to preclude respondents as they have never had a fair opportunity to litigate the incorporation of the acreage limitation in the Project Act. The changes in law since the Wilbur letter and confirmation adjudication are several and significant. Deeply-rooted national policies for family-sized farms would be upset by non-enforcement. Current conceptions of due process teach that notice to "all persons" given in *Hewes* would be inadequate today. These special circumstances dictate an exception.

V. Equitable Estoppel.

Petitioners' plea for "fairness" based upon their detrimental reliance on the erroneous advice of the government is a claim founded upon the concept of equitable estoppel. The decisions of this Court, however, have rejected the application of estoppel which would operate to thwart important public policies. Even under the estoppel doctrine adopted by several of the U.S. Courts of Appeal, which utilize a balancing test, the importance of policies underlying the acreage limitation strongly militates against an estoppel.

ARGUMENT

I. The Family-Sized Farm Objects of Congress

Amici find the statutory construction and legislative history arguments of petitioners are unpersuasive as did the U.S. Court of Appeals for the Ninth Circuit. The panel there patiently explained how

> Congress has exempted some projects from the operation of these [Reclamation law] provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken* 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed. 1313 (1958). *U.S. v. Imperial Irrigation District* 559 F.2d 509, 527 (9th Cir. 1977).

Turning to the legislative history, after careful review they then held:

> Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legilsative [sic] history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners. 559 F.2d at 535.

The correctness of these conclusions may be seen all the more clearly in the context of the several but concomitant Congressional endeavors to foster family-sized farms. Beginning with Thomas Jefferson's advocacy of "easy access to the land, small units, and a nation of farmers who personally worked their own lands"[9] through the Food and Agriculture Act of ("Farm Bill") 1977, *Amici* present and urge upon this Court a perspective of statutory interpretation that takes into account the extended and interconnected history of farm and land policy legislation of

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9. M. R. Benedict, *Farm Policies of the United States*, 1790-1950, *A Study of Their Origins and Development* 5 (1953). See also Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 512 (1955).

which the reclamation acts are but a piece.[10] Professor Sands explains this approach as being "more inclusive than the literal inquiry of *in para materia* . . . [probing] basic [legislative] policy and the pattern and development of the means and procedures used to activate that policy." Of course, the more traditional principal of *in para materia* also applies to the several reclamation acts themselves.

This broad approach to statutory interpretation was likewise utilized by the late Mr. Justice Harlan as an analytical tool in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1971). He explained:

> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations. . . .

Professors Paul W. Gates, Paul S. Taylor, and Murray R. Benedict have demonstrated the necessity for this approach in their thorough historical studies of American land and agricultural policies. Professor Gates explains:

> The framers of the Newlands Act [the Reclamation Act of 1902] thought of it as a continuation of a long line of measures, all devised to bring about the establishment on the public lands of sturdy yeomanry, no matter how hard the struggle of farm making on the

10. C.D. Sands, 2A *Sutherland Statutory Construction* § 45.10 (4th ed. 1973). See also §§ 51.03 and 53.03.

> frontier. By denying water to owners of excess land within projects it was expected that all such owners would be compelled to sell their surplus holdings, presumably at prices not too difficult for homesteaders to pay. The framers of the Newlands Act were especially anxious to convey the impression that it was in the tradition and a continuation of the Homestead Act which had aided 600,000 people to acquire farms in the more humid regions of the West.[11]

Even earlier Professor Taylor had emphasized the significance of a 1903 address of President Theodore Roosevelt to the students of Stanford University:

> After noting that the early land laws had been "twisted into an improper use, so that . . . they tend to create a class of men who . . . obtain large tracts of soil for speculative purposes, or to rent out to others," he charged the students to take leadership in "securing the right use of waters, and of seeing to it that our land policy is not twisted from its original purpose, but is perpetuated . . . to turn the public domain into farms each to be the property of the man who actually tills it and makes his home on it."[12]

The tenor of this larger context is echoed even in the floor arguments of Representative Francis C. Newlands as he shepherded the original Reclamation Act through the House.

> We have not felt in this country the evils of land monopoly. Lord Macaulay said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That

11. *History of Public Land Law Development* 656 (1968).

12. *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 479 (1955).

> will be the test of the future, and the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country, to give to each man only the amount of land that will be necessary for the support of a family . . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution, which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of Filipinos against Spanish authority. 35 *Cong. Rec.* 6734 (1902).

In the sections that follow *amici* demonstrate an unmistakeable continuity of legislative purpose to the earliest deliberations of the Confederation, actions of early Congresses, the Land Law of 1820, the Homestead Act of 1862, the agricultural science network created by the land grant college acts, the Reclamation acts, and contemporary agricultural legislation.

The American land laws of the first half of the nineteenth century sought the distribution of the public domain in a family-sized farm pattern. As price speculation occurred and land monopoly abuses spread, various regulating devices were ventured by Congress (e.g., the Preemption Act of 1830 *infra* section A). By mid-century it had become clear that a wholesale revision was needed and in 1862 that was undertaken in the Homestead Act (*infra* Section B). To yet further bolster that legislative endeavor, Congress also during that year created a cabinet-level Department of Agriculture and laid the foundation for a nationwide network of land grant institutions to act as agricultural science resources to further foster and maintain this family-sized farm principle (*infra* Section D). That

support complex was added to subsequently and the imperative of fostering and preserving the family-sized farm was addressed with increasing clarity (e.g., the Smith-Lever Act *infra* Section F). By late century the domain of lands remaining for development was primarily west of the one-hundredth meridian. Here water was (and is today) an essential predicate for viable agriculture. Thus the federal scheme had to expand yet again in the form of the reclamation acts. As was the experience with the initial land distribution acts, abuses followed the first legislative action of 1902 leading to tightening amendments, especially in 1926 (*infra* Section G). Finally, as recently as 1977, Congress reaffirmed this family-sized farm keystone in contemporary American agricultural policy (*infra* Section H).

A. THE JEFFERSONIAN IDEAL

> [S]tudy . . . reveals agriculture as one of the main supports of American democracy because it is an occupation embracing millions of freemen who own property and cultivate land on a somewhat equal basis. . . . [T]he family-sized farm is the American ideal and means in effect that the owner and his son or sons can perform the actual work of tillage. . . . Hired men are rather the exception than the rule in this typical agriculture. So far as they are employed, it is usually with the instinctive purpose of raising the labor force to the normal family plane rather than in hope of abnormally expanding the business beyond the family farm norm.[13]

Previous to the Revolution, land policies had developed from several different premises. Generally the Southern Colonies typified a large scale plantation system whereas

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13. J. Schafer, *The Social History of American Agriculture* 289-90 (1936).

in New England a more egalitarian and rigorous plan of settlement flourished. With the coming of the Confederation a uniform policy was needed for western lands ceded to the common good.[14]

Thomas Jefferson and Alexander Hamilton figured early and with prominence in this initial period of debate over land policies. During his tour as minister to Paris, Jefferson pondered over the ideas he had earlier expressed to Pendleton.[15] The opportunity to tour the French countryside prompted him to return to the theme of small scale agriculture in a letter to the Reverend James Madison.[16] From Fountainbleu, he wrote:

> Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land, shall be at liberty to cultivate it, paying moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be

14. Gates, *supra,* chap. IV "Land Ordinances of 1785," 59-74; Benedict, *supra,* chap. I "Formation of American Land Policy, 1785-1900," 5-12.

15. The first occasion when Jefferson expressed these sentiments in writing would seem to be his letter to Edmund Pendleton of August 13, 1776. Boyd, 1 *The Papers of Thomas Jefferson* 492 [1950].

16. Not to be confused with his statesman cousin, Bishop Madison was the President of Jefferson's alma mater, William and Mary College.

> without a little portion of land. The small landholders are the most precious part of a state. . . .[17]

In contrast were Hamilton and

> [H]is followers, in search of funds for an empty treasury, [who] wanted to sell the lands to the best financial advantage of the federal government. This meant restricting entry to less than the amounts of land desired by settlers, in order that scarcity might create higher values. They were not much concerned with the form of the social structure that would result. It was purely a business matter. If sale in large units to speculative subdividers, or to those who might eventually create manorial estates, would yield more revenue to the treasury, there was no prejudice against this.[18]

Jefferson was involved with two Confederation committees and the resulting Ordinance of 1785 was largely a victory for the New England scheme, land at one dollar per acre, but extremely limited credit arrangements.[19] Thus the struggle over land policies was hardly finished as the Washington Administration took office in late April, 1789 and Jefferson and Hamilton faced off as Secretaries of State and Treasury, respectively.

> The young nation was desperately poor. Its credit was almost nil. Its ability to levy taxes for its support had not yet been demonstrated. By far the largest asset under its direct control was the huge public domain larger even then than the entire settled area of the original thirteen states. It would be inconceiv-

17. A. Koch and W. Peden (ed.), *The Life and Selected Writings of Thomas Jefferson* 390 (1944).

18. Benedict *supra,* at 5.

19. Gates, *supra,* 62-65; Benedict, *supra,* 11.

able that such an asset would not immediately command the interest of a hard-pressed Secretary of the Treasury seeking to establish the nation's credit and make good on its bonds; hence the early clash of opinions about how these lands should be transferred into private ownership and settled.[20]

The first product of that ideological collision was the Land Act of 1796[21] and it resulted in only an increase in minimum price to two dollars per acre and again minimal credit opportunities.[22] This latter constraint on countless farm families who ventured into the Northwest Territory, mastered the land, but struggled over the federal government's credit terms led to twelve Congressional acts for credit relief between 1809 and 1820.[23]

> Thus over a period of twenty years there emerged the main outlines of a plan for transferring lands from the public domain into the hands of farmers that has had much to do with the agricultural pattern of the North Central and some of the Lower Mississippi Valley states, including the bulk of the great general farming area of the United States. . . .The farms developed under this plan are predominantly family farms on which the labor is performed mainly by the farmer and his family.
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> . . . .
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> Though the pioneering farmers had thus achieved some of the ends they sought, they were by no means

20. Benedict, *supra*, 4.

21. Act of May 18, 1796, 1 Stat. 494.

22. Gates, *supra*, 125-126; Benedict, *supra*, 13.

23. Benedict, *supra*, at 17; Benedict comments "Thus was established a pattern of action which has continued into recent times in the handling of similar problems in many of the federal irrigation projects—a practice which lends itself to unwarranted efforts to exploit the government, as well as to demands based on genuine need for relief."

> satisfied. The troubles of the national government in disposing of its lands were not at an end.[24]

Further reforms were attempted under the Land Law of April 24, 1820, 3 Stat. 566.

> Though it did not grant pre-emptions and donations to settlers as desired by the western pioneers, it marked a step forward in the establishment of policy. It was made applicable to all public lands of the United States, thus providing a uniform method for disposing of them regardless of location. They were to be sold at public auction in half and quarter sections. Private sale also was permitted. Some pre-emption rights were recognized for settlers who paid in part for their lands and gave up part. At private sale, purchasers might buy as much as a section, or as little as eighty acres. The minimum price was set at $1.25 per acre. No credit was allowed. Hence this act marked a reversion to straight cash sales.[25]

Professor Gates elaborates upon this "preemption" problem:

> Preemption, the preferential right of a settler on public lands to buy his claim at a modest price, had been generally conceded . . . to persons on the outer edge of the frontier by the time of the American Revolution. This privilege had not always been won easily, and only by vigorously resisting ejectment and fiercely demanding the right to acquire the land for a small payment or fee, in preference to all others, had the settlers been victorious. If, unluckily, they found themselves on absentee-owned land and ejectment proceedings were brought against them, they insisted on payment for the value of all improvements they had made.[26]

24. Benedict, *supra*, at 16.

25. Benedict, *supra*, at 17.

26. Gates, *supra*, at 219. *See generally* his chapter X, "Preemption," 219-47.

A general preemption measure was enacted in 1830. 4 Stat. 420. But it was only for a year's duration and was retroactive only for settlers who had been in possession and cultivated during 1829. They were limited to making "entry" on no more than 160 acres.

Reports of speculation and demands for reform continued notwithstanding.

> By the early forties criticism of the growing "monopoly" of the public lands was being expressed by George Henry Evans and his associates in the National Land Reform Association. Evans declared that every man had a natural right to a portion of the earth for his maintenance, that the public lands belonged to the people, and that title should be based on use, not purchase. He wanted land sales to be made to actual settlers only and to be limited to small unalienable properties. Such a policy would help to rid the cities of their unemployed and thus better the lot of those who remained.[27]

B. THE HOMESTEAD ACT

Professor Taylor has ably summarized this era of shaping the rural society of the nation in an article published while this case was pending in the Ninth Circuit.

> In years preceding the Civil War, national land policy was under recurrent congressional debate. The nation's frontier was moving westward, and an underlying issue was whether national land policy should favor expansion of the New England family farm pattern or the southern plantation-slave-labor system. The family farm pattern won out when Congress passed and President Abraham Lincoln signed the Homestead Act in 1862. [Ch. 75, 12 Stat. 392, 43 U.S.C. § 161 (1964)] The new law was designed to favor the

27. Gates, *supra*, at 170-71.

> actual settler on the land, and was passed after southern representatives had left Washington with the outbreak of war. Historian Benjamin H. Hibbard has described the Homestead policy:
>
> "Settlers finally could acquire farms of 160 acres free of all charges, except a minor fee to be paid when filing the claim. To insure permanency of settlement the law specified that before title to the land was gained the individual must live on the homestead for five years." [*A History of the Public Land Policies* 385 (1924)]

Although the intent to insure permanency was clear, the device to achieve it was inadequate. Pointing to the critical weakness, Hibbard notes that the public policy controls ended once title had passed from the government to a landowner:

> "With the feeling that all land should be made private property as rapidly as possible . . . that laissez faire is the best policy. A land policy means social control over one of the greatest instruments of production. . . .
>
> . . . .
>
> "That the land issue is not settled once for all by and through private ownership is demonstrated in the history of most countries of which we have knowledge, and conspicuously in the struggles going on around us to-day [1924]. Not only do Russia and Mexico furnish evidence of the persistence of the land problem long after land has once been put into private hands, but countries much more stable exhibit tendencies almost as pronounced and not greatly different in character. For example, within a quarter century there has been a virtual revolution in the land system of Ireland, supervised and financed through government . . . in Denmark . . . in New Zealand . . . Australia . . . ." [Ibid. 562-563.]

> As the nation's agricultural frontier moved westward across the hundredth meridian, the insufficiency and undependability of rainfall began to impede successful homesteading by family farmers under the terms of the Homestead Law.[28]

The Congress therefore passed a succession of further measures designed to foster and support family-sized farms.

C. THE DESERT LAND ACT

There were several settlement measures subsequent to the original Homestead Act which opened lands in the West not subject to preemption and the Desert Land Act[29] of 1877 in particular was the basis for the initial private acquisition of much of the irrigated lands of the Imperial Valley.[30]

Professor Gates explains its provisions:

> [U]pon filing of the application a payment of 25 cents per acre was to be required, three years to be allowed for the completion of the improvements at the expiration of which time the balance of $1 an acre would be due. . . . [I]ndividuals could make only one entry and the 640 acres selected were to be in reasonably compact form.[31]

D. THE MORRILL ACT

The Morrill Act of 1862 provided for the original grant of land to the various states for the endowment, support

28. Taylor, *Public Policy and the Shaping of Rural Society*, 20 SOUTH DAKOTA L.REV. 475, 480-481 (1975).

29. Ch. 107, 19 Stat. 377, 43 U.S.C. §§ 321, *et seq.*

30. T. H. Watkins, *California: An Illustrated History* 308-310 (1978); D.Br. 10, ftn. 10.

31. P. Gates, *History of Public Land Law Development* at 638. Mr. Justice Rehnquist recently reviewed the background of this Act in *California v. United States*, 438 U.S. 645, 657-58 (1978) so *amici* do not tarry on the subject.

and maintenance of agriculture and mechanical arts. Ch. 130, 12 Stat. 503, 7 U.S.C. §§ 301-305, 307, and 308. The Act granted to the states public lands equal to 30,000 acres for each Senator and Representative in Congress. Discussion in support of the Act shows in no uncertain terms that its intent was to foster a way of agricultural life that would help—not eliminate—small farmers. The Act's legislative history demonstrates that it was enacted in response to a recognized need to make higher education available to persons other than the privileged few, and thereby to develop "the minds of the masses," "the mind of the laborer," and the "intellect of the man who labors and sweats for his own bread." *Cong. Globe* 720, 35th Cong., 2d Sess. (1859). The legislation was intended to benefit the "rural population" as a whole and the endowment was provided in the nature of a trust for that purpose. *Id.*, 719, 720, 724.[32]

When the Morrill Act of 1862 was first introduced into Congress, its author, Congressman Morrill, concluded that: "The prosperity and happiness of a large and populous nation depend: 1) Upon the division of the land into parcels. 2) Upon the education of the proprietors of the soil." *Cong. Globe* 1692, 35th 1st Sess. (1858). Congressman Morrill also emphasized the following conditions in justification for the Act: the wide-spread deterioration of the soil; the specific need to test soils and crops; the need and desire for scientific knowledge by individual farmers; the absence of schools for practical education; the need to act to benefit the working classes; and "to do something for agriculture worthy of its national importance." *Id.*, 1693-95, 1697.

32. In 1890, a "second Morrill Act" passed, providing for further endowment to the Agricultural Colleges and expressly creating separate colleges for Negro students. Ch. 841, 26 Stat. 417, 7 U.S.C. §§ 321-326, 328 (1964).

E. THE HATCH (OR AGRICULTURAL EXPERIMENTAL STATION) ACT

The Act (Ch. 314, 24 Stat. 509) was intended to insure that people in need of agricultural education and information would receive it, and that the money would not be diverted for other purposes not intended by Congress.[33] To this end, it established agricultural experiment stations to do research and work in addition to the Colleges, "to give practical direction to agencies which Congress has already created" and "to increase the efficiency of these Colleges in their relation to agriculture exclusively." H.R. Rep. No. 848 49th Cong., 1st Sess. 8 (1886).

This theme, to provide assistance to the farmer on the land who was otherwise powerless and in serious need of government assistance and support (in contrast to land speculators, trusts, and monopolists), continues to the present day. Thus, when the Hatch Act of 1887 was enacted adding the experiment stations to the land grant complex (and in part in response to the fact that then existing agricultural colleges were providing little benefit to individual farmers), the principal purposes of the land grant complex was nonetheless reaffirmed.

> In our zeal to look after the manufacturing interests of the country we have overlooked in a very large measure *the men who are without power to combine,* who are without the power of association and the consequent power to influence public opinion. 17 Cong. Rec. 725, 49th Cong., 2d Sess. (1887) (Emphasis added).[34]

33. There existed concern in Congress that several states had diverted the Morrill Act endowment for unintended purposes, particularly education in non-agricultural subjects, and were providing little benefit to individual farmers. *See, e.g.,* 17 *Cong. Rec.* 6678, 49th Cong., 1st Sess. (1886); 17 *Cong. Rec.* 1041, 1043, 1077, and 1083, 49th Cong., 2d Sess. (1887).

While the Hatch and Morrill Acts provided specific means of developing agriculture information needed by the individual farmer, they did not provide a method of communicating the information to the people on the land.

F. THE SMITH-LEVER ACT

The final component of the land grant complex resulted from the enactment of the Smith-Lever Act of 1914, Ch. 79, 38 Stat. 372, 7 U.S.C. §§ 341 *et seq.*[35] By adoption of this Act, the third element of the land grant complex was added —the Cooperative Extension Service. The Act authorized federal appropriations to take the teachings of the agricultural colleges and research of the experiment stations directly into the rural areas, for the benefit of rural people. In actuality, most land grant colleges had been engaging in such "extension" activities for several decades. Smith-Lever merely recognized this reality and appropriated additional

34. During the public discourse leading towards passage of the Hatch Act, advocates of the legislation were quite clear on this point: "the farmer's work is not big business, they argued, and he needs the assistance of the government where business and commerce do not." Eddy, *Colleges for Our Land and Time* 96 (1956).

35. The legislative history of the Smith-Lever Act is far more extensive than that of the Morrill or Hatch Acts since there was an extensive debate over the fundamental purposes of the whole scheme of the three statutes. The Smith-Lever Act was viewed as an integral part of the Hatch and Morrill Acts as the means by which to fulfill the purposes of those Acts: "The measure . . . is simply an appropriation to perfect the work of the Morrill Act and the Hatch Act . . . to carry the knowledge they have gathered . . . to the whole people engaged in agriculture. . . ." 49 *Cong. Rec.* 1956, 62nd Cong., 3rd Sess. (1912); the Senate Report stated that the "object of [the Act was] to carry to the farmers at their homes the knowledge gathered at the agricultural colleges and the experiment stations. . . ." S.Rpt. No. 139, 63rd Cong., 2d Sess. 2 (1913).

federal funds for this purpose. Consistent with the theme of its predecessor legislation, the Smith-Lever Act made it clear that it was "the little fellow" that was the intended beneficiary of the land grant complex. Its co-author, Congressman Lever, stated that:

> *The man we desire to reach is the small farmer,* the man who does not read the bulletins, the man who has no confidence in book farming, the man who does not take an agricultural paper. *We want to reach the little fellow out in the farm who needs help.* [Applause] 48 *Cong. Rec.* 10852, 62nd Cong., 2d Sess. (1912) (Emphasis added.)

By providing the means for "diffusing" the information developed by the Agriculture Colleges and Experiment Stations, Smith-Lever greatly improved the statutory scheme and defined the specific purposes of the land grant college complex.[36]

Once again, the common theme exists that the small farmer was intended to be a primary beneficiary—not a victim—of the work done. According to its author, Congressman Lever, when the bill was first introduced, said its purpose was "to disseminate through the agricultural colleges to the people themselves on the farm the information that we have been gathering for the last half century." 48 *Cong. Rec.* 9252, 62nd Cong., 2d Sess. (1912). Lever explained that this Act was necessary to fulfill the purposes of the Morrill and Hatch Acts. *Id.,* 10851. These purposes were not to act solely at the behest of large trusts, landowners, or as Lever referred to them, "men [with] power to combine."

In Smith-Lever, the earlier goals were reaffirmed: To promote agricultural education among the masses of the

36. Owing to a dispute over the formula for appropriating funds, no bill was approved by the 62nd Congress, and the matter was acted upon during the following year, in the 63rd Congress.

population; to remedy conditions of relatively low yield per acre, low increase in the productivity of the soil, decline in farm and rural populations, decrease in per capita production and increase in farm indebtedness. *Id.,* 11636, 11637, 11707; *see also* 51 *Cong. Rec.* 1932-33, 63rd Cong., 2d Sess. (1914). Similar goals were stated by its author in the Senate, Senator Smith, in order to benefit "49,000,000 men, women and children" who occupy "the farmlands of our States, . . . [a] large number [of whom] struggle to earn a livelihood and cannot afford to experiment for the purpose of learning things that are new." 49 *Cong. Rec.* 832, 62nd Cong., 3rd Sess. (1912).

Perhaps the best indication of the principal Congressional purpose in establishing the family-sized farm support complex came during the Smith-Lever Act debate in the Senate to establish the basis on which funds would be apportioned to each state. A heated controversy existed over whether rural population or simple acreage should be used as the funding basis. If distributed on the basis of rural population, states with many small farmers would receive more than if the formula was based upon acreage since the structure of agriculture in many states consisted of a comparatively few number of farmers cultivating large plots of land.[37]

In this "land vs. people" debate, the author of the bill, Senator Smith, strongly advocated "rural population" (defined as the population in towns of 2,500 or less) as the basis for appropriation. 51 *Cong. Rec.* 1826, 63rd Cong., 2d Sess. (1914). In response, Senator Cummins of Iowa, the principal spokesman for the acreage basis stated:

37. Fifty years before, in enacting the Morrill Act, the identical issue arose. Senator Gwin of California attempted to amend the bill to apportion the grant on the basis of acreage as well as population. The proposed amendment was rejected without debate. *Cong. Globe* 785, 35th Cong., 2d Sess. (Feb. 4, 1859).

> "Why not adopt another standard . . . namely the area of land in each State under practical cultivation? It is intended to make that land more productive. It seems to me the benefits of the bill if distributed according to the lands under cultivation in each State would be more fairly, more equitably divided. . . ." *Id.*

Senator Cummins and his supporters argued forcefully, albeit unsuccessfully, that the purpose of the land grant college complex was to increase productivity of land, not of people. They further contended that the benefits of the bill could not, or should not, be provided to all of the persons included in the rural population base (*e.g.*, farm laborers, small farmers, etc.) *Id.*, 2654. Senator Root of New York, a fervid supporter of a rural population base, disagreed forcefully. In language particularly applicable here, he stated:

> [T]he people whom we should most desire to help are the small [land] holders and not the large holders. It is the small farmer who is getting along just on the edge of poverty, with the little farm, who needs the kind of instruction and the encouragement which this bill will furnish, and not the man who has his thousand acres and who has at his command, without any help, all of the literature and all the instruction and high-priced assistance and superintendence for himself. *Id.*, 1826.[38]

Even the supporters of an acreage basis recognized that small farmers were intended to benefit from the land grant

38. It is important to point out that Smith-Lever was adopted at a time of great social, industrial and agricultural change. The "progressive movement" was at its peak and many of its individualistic, agrarian and anti-monopoly ideals and values are reflected in this legislation. *See generally, R. Hofstadter, The Age of Reform* 94-130 (1955). Of course, this is true *a fortiori* of the reclamation legislation between the initial foray of 1902 and the Omnibus Adjustment Act of 1926. See generally Taylor, ***The Excess Land Law: Execution of a Public Policy,*** 64 YALE L.J. 477, 487 (1955).

complex—not be driven out of existence by its research and development activities. Senator Cummins, in response to Senator Root's comment, acknowledged: "The observation made by the Senator from New York in one respect is true. The bill is intended partially, possibly largely, for the benefit of the small farmer. . . ." *Id.* He then urged that if the small farmer was to be the beneficiary, Congress should use "agricultural" rather than the overall "rural" population. *Id.* This view too was rejected.

Senator Cummins compared his own state of Iowa to Georgia (Senator Smith's state) and noted that while they were essentially equal in total population and total land area, Iowa had two and one-half times more acreage in improved farm land than in Georgia, more than double the value of agricultural production, and the average Iowa farm was three and one-half times larger than the average Georgia farm. A similar comparison was made for 12 other Midwestern states and 12 other Southern states. Under the rural population basis, the Southern states received 40% of the funds, compared to 36% for the Midwestern states which produced practically twice as much in agricultural crops. *Id.*, 2581-82. Senator Cummins said that in his view, the purpose of the bill was to increase production "so that prices may decline. . . ." *Id.*, 2650. Therefore, the bulk of the funds should go to those states, the Midwest, that produced the most. This position was most explicitly stated by Senator Hitchcock:

> "If there is any theory at all upon which it [the vote of an urban Senator] can be defended, it is that the effect of the [bill] . . . is to reduce the cost of living by reducing the cost of food. The Senator from Georgia [Smith] will realize that the great prairies out here that are cultivated, as he says, by machinery more

> than by men, are the very regions where the food of the cities is produced; and it is in the improvement of agricultural conditions upon those great fields that the man living in the city can hope . . . to secure a reduction in his cost of living. *Id.*, 2735.

This view was explicitly and decisively rejected by Congress.

In contrast, those supporting the legislation said, "it is human beings, and not broad acres that we are trying to educate; we are trying to improve the man; so that the man, by this superior knowledge may improve the farm, thus bringing added wealth to our country." 51 *Cong. Rec.* 2732, 63rd Cong., 2d Sess. (1914). (Remarks of Senator Brady.)[39] As Senator Smith recognized, by helping rather than hindering the small farm, the nation in its entirety would benefit:

> [T]he small farms around the big cities . . . and in the balance of the States will be increased in their capacity to furnish this food by the training to be given to the individual man, . . . which will increase the food supply and take care of the great cities, as well as the rural population. *Id.*, 2735.

A strong sentiment was expressed in support of those engaged in intensive agriculture, on small farms, rather than larger, more mechanized landowners:

> [T]he purpose of the bill is to instruct the farmer—that is, to instruct men. . . . The farming is necessarily for the local market and is intensive . . . . [T]he small farmer . . . is the very man who needs more than any other all the aid that science can furnish; and for that reason it appears to me to be fairer to base the distri-

39. This debate has its contemporary counterparts e.g. Mr. Justice Clark's discussion of the land versus people debate in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 297 (1958).

> bution of the fund on the rural population than upon the number of acres. *Id.*, 2740 (Remarks of Senator Lodge.)

Senator Cummins could only muster 16 votes for his amendment. *Id.*, 2744. The rejection of this amendment, and the surrounding debate, reflect a clear purpose and priority: to act first and primarily for the small farmer and landowner who needs (and cannot afford) the help the most.

Thus, the Smith-Lever Act completed the land grant system begun by Morrill in 1858. Congress subsequently enacted additional appropriation bills increasing the funding of land grant colleges[40], but none altered the principal beneficiaries or original purposes of the land grant college acts: to act primarily for the benefit of small farmers, the "little people" of rural America, to deter loss of rural population and migration to the cities, to benefit consumers, maintain strong viable communities, and improve the quality of rural life.

G. THE RECLAMATION ACTS

Respondents have already developed[41] with some care the immediate background of the reclamation legislation

40. E.g., the Purnell Act of 1925, ch. 308, 43 Stat. 970 which dealt, *inter alia*, with "farmer's economic problems . . . wide and varied field of home economics and the social problems of country life." 66 *Cong. Rec.* 3449, 68th Cong., 2d Sess. (1925); the Bankhead-Jones Act of 1935 and 1946, 7 U.S.C. § 427 (altering the funding formula to include a composite of rural and farm population.)

41. Respondents have excerpted substantial portions of chapter 8 ("Federal Reclamation Law") of the legal treatise *Water and Water Rights* (edited by Professor Clark, 1967). The author of chapter 8 is the noted water law expert Joseph Sax of the University of Michigan law school. Because respondents are already presenting the Sax discussion to the Court and because Professors Benedict and Taylor present historical corroboration, *amici* omit referencing the works of Professor Sax.

which preceded the Boulder Canyon Project Act of 1928. Ch. 42, 45 Stat. 1057, 43 U.S.C. §§ 617-617t, L. App. 134a-150a.

Professor Benedict traces the clearly discernible progression of law-making in support of family-sized farming from the New England plan of settlement through the land grant college acts to the reclamation legislation. (His footnotes are edited and renumbered.)

> The early land legislation which culminated in the Homestead Act of 1862 related almost wholly to land watered naturally by rainfall. When the arid regions farther west began to be taken up by farmers it soon became evident that the settlement plans designed for the humid areas were poorly suited to the lands of the Plains and Mountain states and to those of the Pacific Coast ....
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> As this problem became more evident various laws were passed to alleviate it.[42] These did not meet the situation adequately though they afforded some relief. By an act passed in 1866 (amended in 1870) the federal government relinquished any control it might have over the waters of nonnavigable streams in the West, and acknowledged water rights established under local customs and laws.[43] This was to give rise to important policy controversies in a later period, but was a logical course when the act was passed.

42. For a fuller discussion of this problem and the laws pertaining to it, *see* E. L. Peffer, *The Closing of the Public Domain, Disposal and Reservation Policies, 1900-50,* ch. 8, "Homesteading the Arid West," (1951).

43. There had been some earlier legislation relating to classified lands, namely, the acts turning over to various states swamplands of specified types. These acts (1849, 1850 and 1860) were designed to facilitate the reclamation of lands subject to overflow. Title was transferred to the states in fee simple, with provision that proceeds from sale of the lands should be used for reclaiming them by means of levees, drains, etc. In all, more than 64 million acres of public lands were transferred to the states in this way.

> The Desert Land Act of 1877 did little to correct the situation, though a good deal of land was taken up under its provision. [footnote omitted] A more considered effort to meet the problems of the arid West took shape in the Carey Act of August 18, 1894. This was designed to meet recognized defects in the Desert Land Act and the Act of October 2, 1888. The Act of 1888 included provision for surveys by the Geological Survey to determine which lands in the arid regions could be reclaimed by means of irrigation. It also directed that lands designated as suitable for reservoirs, ditches and canals should be held as the property of the United States and not subject "to entry, settlement or occupation until further provided by law."[44]
>
> The Carey Act granted one million acres to each state containing arid lands, on condition that the state provide for the necessary reclamation. The states were to determine the procedure to be used. The usual plan

44. Much controversy arose over the interpretation of this act. "The Department of the Interior and the Acting Attorney-General interpreted the language to mean that 'entries should not be permitted therefor upon any part of the arid regions which might possibly come within the operation of the Act.'" R. Teele, *"The Economics of Land Reclamation in the United States"*, 65-66 (1927). The reaction in the West to this interpretation, which meant virtually the withdrawal from entry of all public lands in the arid regions, was so vigorous that the provision was repealed in 1890. In the congressional debates it was claimed that the act constituted a "system of national irrigation." They thus foreshadowed the controversies over reclamation policies in California which developed in the 1940's. The Department of the Interior already was laying claim to broader powers than the farmers of the West were willing to concede to it. Teele concludes (p. 66) that "Congress in providing for these surveys did not intend to establish a system of national irrigation, and that the advocates of such a system in the Department of the Interior defeated their purpose by enlarging the scope of the reservation provided for far beyond the intent of Congress. This destroyed what might have grown into a nationally controlled development of the arid lands of the West and restored or reinstated the policy of leaving unobstructed the course of private development."

was for them to contract with construction companies to reclaim specified areas and to sell "water rights" as a means of recovering their investments. The land was sold by the states at nominal prices, but only to those who had contracted for the purchase of the water rights.

The results were far from satisfactory. The construction companies sold bonds which many investors thought were in some way guaranteed by the federal and state governments. It was also widely believed that the bonds constituted a lien on the lands. Neither of these assumptions was correct, though the Congress intended that such costs should become a lien on the land. As a result of these misconceptions, bonds were more salable then they otherwise would have been, and many unsound projects were undertaken. Since the act applied only to public lands, the scope for operation under it has been continually decreasing owing to the alienation of such lands under other legislative provisions. [footnote omitted]

Professor Benedict goes on to describe the Newlands Reclamation Act of 1902:

> The time was ripe for a change of policy in respect to irrigation development. When settlement of the arid regions was first begun, small irrigation systems were developed by individual farmers who took water from streams adjoining or running through their properties. Even before that, modest developments had been made by the mission fathers in California . . . . Individual farm-irrigating systems were also common in the Black Hills of South Dakota and in the valleys of California and Colorado. Numerous water systems were also developed by the miners in California after the gold discoveries of the middle of the century, and much of the custom and law relating to water rights in California grows out of their use in mining rather than agriculture.

The amount of land that could be irrigated through these rudimentary arrangements was limited, indeed, and in no sense adequate to meet the growing demand. With the passage of enabling acts in the various states and the activities initiated under the Carey Act, group projects for the building of dams and canals and the distribution of water became common. Most of these were organized as irrigation districts with many of the powers and characteristics of minor civil divisions of government. Some were corporate ventures privately owned.

By the turn of the century most of the better irrigable areas, especially those that could be developed at modest expense, had been brought under irrigation in these various ways. There were lands that still could be irrigated, some of them very good lands, but the structures required called for huge investments suited only to government undertakings rather than to the resources of private corporations or small groups of farmers. The West was eager for settlement and development, and, with its disproportionate representation in the Senate, it was coming to have a powerful influence in legislative matters. Furthermore, the growing interest in conservation, coupled with a new if somewhat unwarranted fear that we were approaching a situation of chronic underproduction of foods, gave impetus to federal action in creating more farms. The interest of the President was easily enlisted in a project of this kind.

The result was a new law, the Reclamation Act of 1902, which marked a significant change in American land policy.[45] First, it was an attempt to set up, for

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45. This new approach to the land problems of the arid West had been implied in the work of Major John Wesley Powell, which began at a much earlier date. Powell, a veteran of the Civil War, explored the Grand Canyon of the Colorado in 1869. His reports led presently to a survey under the auspices of the Smithsonian Institution. As a result of Powell's pioneer work and the publication, in 1878, of his *Report on the Lands of the Arid Region of the United States,*

irrigable lands in the West, a policy that was specifically designed for that area. Secondly, it provided funds, without interest, for the development of such lands. Thirdly, it implied more paternalism on the part of the government than had characterized any previous land legislation. In addition, it brought up the question of government versus private production of hydroelectric power. Roosevelt had already expressed himself strongly on this latter issue by vetoing a bill which would have authorized private development of power at Muscle Shoals, Alabama. [Footnote omitted] More and more the public was coming to regard water power as an asset to be developed as a public resource rather than to be turned over to private corporations for their profit.[46]

In furtherance of that "public resource" perspective, the architects of the 1902 Act employed five devices to deter land monopoly resulting in federal water project areas. Professor Taylor has definitively described them.[47]

H. Exec. Doc. 73, 45th Cong., 2nd Sess., he became Director of the United States Geological Survey in 1880. A Public Lands Commission had been authorized in 1879, with orders to submit to the Congress, within one year, a codification of the laws relating to the survey and disposition of the public domain. It was also to provide a system and standards for classifying public lands as arable, irrigable, timber, mineral, etc., and was to include the recommendations of the Commission for disposal of the remaining part of the public domain. The voluminous and carefully prepared report, of which Powell was one of the authors, included recommendations for the classification of public lands and the repeal of the pre-emption laws and the Timber and Stone Act of 1878. See *Report of the Public Lands Commission*, H. Exec. Doc. 46, 46th Cong., 2nd sess., 1880. Both Powell's work and the report of the Commission were in advance of the thinking of the time and gave rise to considerable opposition. Powell's retirement as Director of the Geological Survey in 1894 was in part a result of antagonism to his policies though it was also due in part to ill health. His views and his contribution to knowledge about the West were, however, to be increasingly recognized as the interest in land policy grew.

46. Benedict, *supra*, 124-27.

47. *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 484-86 (1955).

First was the use of public enterprise to supplement private enterprise in irrigation development. While showing energy in completing less costly projects, private enterprise had exhibited a reluctance to undertake the larger ones. The sponsors of the bill might have suggested giving large blocks of public land to corporations, enabling them to recoup the cost of constructing irrigation works by lease or sale of the land. Congress had used that method to get railroads built, but was not prepared to repeat it to promote irrigation. The House Committee on the reclamation bill rejected the use of land grants specifically because the sacrifice of "our time-honored policy of inviting and encouraging small individual land holdings" was too "stupendous a price" for irrigation development. [H.R. Rept. No. 794, 57th Cong. 1st Sess. 3 (1902)] Instead public enterprise was to be financed by a reclamation fund consisting of revenues from the sale of public lands in the western states. [footnote omitted.] This fund was to recover project construction costs from the benefiting water users in annual installments, not exceeding ten, without interest. [§ 4, 32 Stat. 389 (1902), 43 U.S.C. § 419 (1964)] In this way the fund would revolve and provide continually for new projects.

A second measure to prevent monopolization and assure occupation of irrigated lands by actual settlers was a ban on the commutation provisions of the homestead law when applied to reclamation projects. [§ 3, 32 Stat. 388 (1902), 43 U.S.C. §§ 416, 432, 434 (1964)] The commutation privilege offered a cash alternative to the requirement of personal inhabitancy of a claim. In practice it resulted in the barter of public policy favoring actual settlers for the monopolists' ready cash. Congress, fully aware of this, forbade commutation on reclamation projects in 1902. [Footnote omitted.]

As a third step toward encouragement of settlers and discouragement of speculators and monopolists,

the sponsors of reclamation stiffened the inhabitancy requirements of the earlier homestead law. They prescribed that an entryman must be either a "bona fide resident on such land, or occupant thereof residing in the neighborhood . . ." and must reclaim for agricultural purposes at least one-half of the total irrigable area of the entry. [§ 5, 32 Stat. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1964)] Furthermore, their bill authorized the Secretary of the Interior to lower the maximum area per entry to the acreage "reasonably required for the support of a family . . ."[§ 8, 32 Stat. 390 (1902), 43 U.S.C. § 372 (1964)] They recognized that the traditional quarter-section granted in the humid belt was often too large for a family farm on irrigated land.

The sponsors' fourth anti-monopoly and anti-speculation provision was that water rights shall be "appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." [§ 4, 32 Stat. 389 (1902), 43 U.S.C. § 419 (1964)] Early irrigationists had been greatly dissatisfied with dependence on others in control of their water supply, and regarded tying water and land together in common ownership as among the surest of anti-monopoly devices. [Citation omitted.]

The sponsors' fifth measure against monopoly, the one that has become most famous of all, was the "excess land" provision. It prescribed that "no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . . and no such right shall permanently attach until all payments therefor are made. [§ 5, 32 Stat. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1964)] This law neither confiscates land nor limits the amount of land owned by any *individual* which may receive water from a federal reclamation project. The principle upon which it rests is that no individual should obtain more public water than his equitable share. It is unfortunate

> that the complexity of language required to translate this simple principle into the specifics of acre-feet of water, land and individuals owning land, invites unintentional confusion and facilitates the spread of misconceptions by special interests.

This final device guaranteeing family-sized farm has been the most publicly controversial of the Act's provisions yet it has been reaffirmed by the Congress thirteen times between 1902 and 1946[48] and all subsequent attempts have been rebuffed as well.

These measures were further improved upon by several later amendments. Most significant of these was the Omnibus Adjustment Act of 1926, specifically § 46, 44 Stat. 649, 43 U.S.C. § 423e. As recently as December 6, 1979, the Solicitor of the Department of Interior has explained this act and provision as being "intended not as a substitute for the 1902 Act, but as a means of ending certain abuses of the policies of the 1902 Act; namely, speculation and inefficient administration."[49]

It was loopholes and speculation which led[50] successively to the joint liability contract provisions of the Act of August 9, 1912,[51] the prerequisite of agreement to dispose of excess lands under Secretarial price controls under the Reclamation Extension Act of August 13, 1914,[52] the irrigation district contract authorization of the Act of May 15, 1922,[53] the Secretarial creation of and report by the famous

48. Bureau of Reclamation, *Landownership Survey of Federal Reclamation Projects,* 62 (1946).

49. Opinion of the Solicitor, Department of Interior, M-36919, —Pub. Lands Dec.— ....., (December 6, 1979), slip opinion at 29.

50. See also discussion by Solicitor Krulitz *id.,* at 27-38.

51. 37 Stat. 265, 43 U.S.C. § 541 (1970).

52. 38 Stat. 686, 43 U.S.C. § 471 *et seq.* (1970).

53. 42 Stat. 541, 43 U.S.C. § 511 *et seq.* (1970).

"Fact Finders,"[54] their Act of December 15, 1924,[55] and finally the Omnibus Adjustment Act. Thus at the time of enactment of the Boulder Canyon Project Act in 1928, the family-sized farm guarantees for beneficiaries of reclamation had been reinforced not undermined. That state of the law remains unaltered.

H. THE 1977 FARM BILL

The Morrill, Hatch, and Smith-Lever Acts established the land grant colleges to bring the benefits of learning and research to small farmers, laborers, consumers, and rural Americans. They were *not* established to subsidize and act exclusively in response to demands made by corporate interests, trusts, wealthy land holders, etc. Indeed such a purpose was advocated by some and specifically *rejected* by Congress.

In 1977 Congress enacted P.L. 95-113 (91 Stat. 913 comprehensive legislation reauthorizing all agriculture-related federal programs, including land grant colleges), which provided that, while federally funded agricultural programs need not "be administered exclusively for family farm operations," nonetheless:

> "the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of non-family owned, large-scale corporate farming enterprises will be detrimental to the national welfare. It is . either the policy nor the intent of Congress that agricultural and agriculture-related programs be administered exclusively for family farm operations, but it is the policy and express intent of Congress that no such program be administered in a manner that will place the family farm at an unfair economic disadvantage." *Id.,* § 102, 7 U.S.C § 2266(a).

54. *Federal Reclamation by Irrigation,* S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

55. Second Deficiency Act of 1924, § 4, 43 Stat. 701-04.

Section 102 was a Senate floor amendment by Senator Pearson of Kansas. In his explanatory remarks, he said that his "amendment breaks no new ground, declares no new principle." 123 Cong. Rec. S 8396, 95th Cong., 1st Sess., May 24, 1977 (daily ed.). He stated that the policy has existed "[f]rom the Revolutionary period to the present. . . ." and "was based on the conviction that for social and political reasons small scale, family farming was preferable to large scale estate farming." *Id.* He acknowledged that "[i]t is true we never sought to dismantle the large estates and plantations but we never sought to consciously promote their growth." *Id.* And, he also noted that while "we have not been altogether successful in promoting and protecting the family farm system, . . . our intent to do so has always formed the base of our agricultural policy deliberation." *Id.*

Title XIV of the 1977 Farm Bill, the National Agricultural Research, Extension and Teaching Policy Act (7 U.S.C. §§ 3101 *et seq.*) contains lengthy criticisms of land grant college and other agricultural research. In the hope of insuring that such research be in the "public" rather than "corporate" interest, Congress by this Act estabished the National Agricultural Research and Extension Users Advisory Board, made up of representatives of a wide variety of interests affected by land grant research and development activities (*e.g.,* consumers, farmers, environmental interests, labor, nutritionists, etc.). *See* 7 U.S.C. § 3123.

Section 1402(8)(J) (7 U.S.C. § 3101 (8)(J) of Title XIV states that "new Federal initiatives are needed in . . . programs oriented to the needs of small farmers and their families and the family farm system, which is a vital component of the agricultural capacity of this country." The Senate Agriculture Committee Report noted, in regard to this provision, that:

> "Research on problems and technologies specific to small farmers have [sic] been virtually unfunded. These are the family farmers that Abraham Lincoln [in signing legislation, simultaneous with the Morrill Act, establishing the Department of Agriculture] charged the Department to protect. The well being of these people and their ability to stay on the land are, to a large degree, dependent on appropriate research and extension efforts." S.Rpt. No. 95-180, 95th Cong., 1st Sess. 161 (1977).

Thus, the primary beneficiary of the land grant complex was and is the small non-corporate farmer most in need of government assistance.[56]

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56. This statutory analysis is corroborated by views of our land reform policies from without the United States. For example, in 1969 Doreen Warriner wrote of our American conception of "integral land reform":

> Though the American conception of reform is based on the family farm as its ideal, and in this respect fits in with the liberal tradition, it departs from it by insisting that the individual farm enterprise must be butressed by "a comprehensive program", including supervised credit and extension, and organized marketing. . . . To provide these services in the United States is the function of the Department of Agriculture. *Land Reform in Principle and Practice* 59 (Oxford, 1969).

II. Application of the Pervasive Continuity of Legislative Purpose Doctrine

Given the historical predicate just set out in Part I, how do the petitioners fulfill the imperative for family-sized farms enunciated by so many Congresses? The Bryant class intervenor-defendants fail to meet that criterion.

Respondents' careful review of the trial court record has illumined the large-scale character of this class of excess landholders represented by petitioner Bryant. The Economics, Statistics, and Cooperatives Service of the U.S. Department of Agriculture has further highlighted the magnitude of the Imperial Valley's deviance from the family-sized farm principle:

> The Imperial Irrigation District is the second largest irrigation district in the State, with a gross area of 900,000 acres and 445,000 irrigated acres in 1976. The district is located in Imperial County, which is the southeasterly-most county in the State, bordered by the Colorado River and Mexico . . . . Rainfall averages about 2 inches annually.
>
> . . . .
>
> Imperial County reported a median family income of $8,257 in 1970, about $2,475 below the State median income, with 16 percent of its families below the poverty level.[57] Major cities and towns in the district are: El Centro (pop. 21,150); Brawley (pop. 13,850); Calexico (pop. 13,050) and Holtville (pop. 4,450).
>
> . . . .

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57. County Supervisors Association of California, *California County Fact Book* 1976-77.

. . . In 1974, there were 715 farming operations in Imperial County averaging 716 acres per farm . . . . distributed as follows:

Land in Farms	*Number of Farms*
Less than 50 acres	194
50 to 179 acres	141
180 to 499 acres	139
500 to 999 acres	91
1,000 to 1,999 acres	73
2,000 acres and over	77

Farming operations in the Imperial Valley have traditionally been large-scale, specializing in alfalfa hay for the Los Angeles milk-shed, cotton, feed grains, and winter vegetables. Twenty percent of the farms in Imperial County exceed 1,000 acres. Winter vegetable production is especially risky due to the high chance of a killing frost.

. . . .

> . . . The U.S. Department of the Interior has estimated that 265,000 acres (60 percent of the irrigated acreage) in the District are excess land. It seems likely that much of the excess land is farmed by the 150 farming operations that exceeded 1,000 acres in 1974 and is probably owned by . . . 204 partnerships and corporations . . . .[58]

Perhaps the distinctions between landownership in the Imperial Valley, and the rest of California, can be summarized in the fact that the average irrigated farm in the Valley has 716 acres while the average irrigated farm in California has 164 acres.[59]

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58. *The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis,* No. ECCS-04, 13 and 17 (1978).

59. *Id.,* vii & 17.

In his second annual report to the Congress on the status of the family farm, the Secretary of Agriculture states that nationwide "[m]ultiownership farms (partnerships and corporations) accounted for only ten percent of farms in 1974, but being larger they sold nearly a third of all farm products and farmed one-fourth of the land."[60] Yet in the District, multiownership farms account for twenty-eight percent of all farms and they farm fifty-nine percent of the land; in the District, over one-half of the irrigated acreage is excess lands. While this has not been a sudden development, under reclamation law it is an illegal state of affairs.[61]

Of course, acreage limitation is not a universal land policy, yet for the Imperial Valley which receives the substantial liquid dividends of the Colorado River from the All-American Canal at no cost,[62] it is a modest constraint for Congress to have required, the Department of Interior to have given effect, and for this Court to uphold.[63]

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60. Economics, Statistics, and Cooperatives Service, USDA, *Status of the Family Farm: Second Annual Report to the Congress,* Agricultural Economic Report No. 434, 7 (1979). This report is another manifestation of the concern for the family farm in that Congress mandated it on an annual basis in the 1977 Farm Bill, 7 U.S.C. § 2266 (discussed *supra,* in Part I, section H).

61. The historical background of large scale and absentee ownership is summarized in Taylor, *"Water, Land, and Environment, Imperial Valley: Law Caught In The Winds Of Politics,"* 13 NATURAL RESOURCES L.J. 1 (1973) and USDA, *Land Ownership and Operating Terms in Imperial Valley, California* (1942).

62. Section 1 of the Boulder Canyon Project Act, 45 Stat. 1057, L.App. 134a; plus all repayment costs have been and continue to be paid from hydroelectric power revenues. 322 F.Supp. 11, 14 (S.D. Calif. 1971) and 4 Tr. 477.

63. The principle that federally imposed strings accompany federal dollars is no longer novel. See generally, *King v. Smith,* 392 U.S. 309 (1968); F. Bosselman et al. *The Taking Issue—An Analysis of the Constitutional Limits of Land Use Control* (1973); B. Ackerman, *Private Property and the Constitution* (1977).

A. EXCESS LANDS MUST COMPLY WITH THE ACREAGE LIMITATION DESPITE "PRESENT PERFECTED RIGHTS"

The cardinal principle surrounding application of the acreage limitation of § 46 on excess lands is that absent the entering of a recordable contract, no project water is to be delivered. By a remediable historical accident, in the present case, deliveries have been made for some years in the Imperial Valley. Petitioners begin their briefs with a two-step frontal assault upon this requisite of all reclamation law.[64] They argue first that the Boulder Canyon Project Act on its face requires the satisfaction of the "present perfected [water] rights" of the Imperial Irrigation District irrespective of the excess character of any given landholding within the District. Second, they assert that the District, as a matter of California law, could not fail to deliver water to excess lands.

The vehicle for these contentions is § 6 of the Project Act which bows to Article VIII of the 1922 Colorado River Compact. The Ninth Circuit held that first contention is legitimate but the second is not.[65] The authority the court of appeals relied upon is not even discussed in the Petitioners' briefs, much less distinguished.[66] Section 6 is a limitation on the Secretary's authority but does not decide the issue of eligibility to receive Project Act water in the first instance. The terms and conditions for that eligibility is prescribed elsewhere—§ 46.

Petitioners' argument as to the means of enforcement and their allusion to an unconstitutional "taking"[67] is premature.[68] The long-term federal investment in America has

64. L. Br. 29-33, D. Br. 25-38.

65. 559 F.2d 509, 528-530.

66. *Madera Irrigation District v. All Persons,* 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958); see also Calif. Water Code § 23200 [West].

67. D. Br. 32.

68. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 297 (1958).

been in opportunities for its people. In the ever expanding network of family-sized farm settlement and development laws the federal government has responded to the evolving needs of the time and place but always for the benefit of the "little fellow." Thus when abuses of the Desert Land Act, connivance around the Reclamation Act of 1902, and the Fact Finders report led to the Omnibus Adjustment Act of 1926, it was all not to be blithely forgotten in the Boulder Canyon Project Act.

B. THERE IS AN ACREAGE LIMITATION IN THE BOULDER CANYON PROJECT ACT

The District in its brief before this Court presumes that the language of the Project Act is insufficiently clear.[69] Plunging into the voluminous history of the Swing-Johnson bills,[70] both the landowners and the District build a "house of cards" argument upon snatches of testimony during the third but unsuccessful legislative round in the second session of the 69th Congress.[71] Specifically, they pin their hopes upon H.R. 9826 (69th Cong. 2nd Sess.) which never even went to the House floor.[72] Regarding the final round by the Swing-Johnson team, they emphasize the absence of explicit floor discussion of an acreage limitation in § 14.

The purpose of the historical foundation which *amici* have laid in Part I is to demonstrate that in comparison

69. D. Br. 38-46.

70. See generally the analysis of the Ninth Circuit 559 F.2d 509, 532-536.

71. L.Br. 44-46; D.Br. 40-43.

72. L.Br. 48-51; D.Br. 43-46.

with over a century of consistent, explicit, and ever-expanding support for family-sized farms in congressional enactments, the petitioners "best bid" is a surface treatment which overemphasizes the inessential in the legislative history of the Project Act. The landowners devote an entire section of their brief to the argument that what fragmentary legislative history there is should be given "great deference" so as to avoid "the risk of distortion from subsequent events that threatens *de novo* analysis today."[73]

Much space both in respondents' as well as *amici's* brief has been devoted to developing the factually complex as well as historically intertwined context of the Imperial Valley, the Boulder Canyon Project Act, and well over a century of land distribution, agricultural science extension, and water development legislation. Such continuity of legislative purpose shows that deference is appropriate toward a construction of the Project Act incorporating the acreage limitation tenet of the family-sized farm principle.

III. Enforcement Will Cause Neither Chaos Nor Inequity. Indeed, Enforcement Will Cause the Type of Prosperity Originally Intended by Congress

The Bryant class of excess landowners portray their excess landholdings as part of a thriving, autonomous farm community three-quarters of a century old. L. Br. 20. They are disingenuous in one significant respect: the contention that the present vitality of the Imperial Valley has little relationship to the Boulder Canyon Project Act. This Court took cognizance of the helpless and bleak plight of those in the Valley *prior* to the Project in its 1963 opinion in *Arizona v. California,* 373 U.S. 546, 552-555.

73. L.Br. 53-56.

In the second half of the nineteenth century a group of people interested in California's Imperial Valley conceived plans to divert water from the mainstream of the Colorado to give life and growth to the parched and barren soil of that valley. As the most feasible route was through Mexico, a Mexican corporation was formed and a canal dug partly in Mexico and partly in the United States. Difficulties which arose because the canal was subject to the sovereignty of both countries generated hopes in this country that some day there would be a canal wholly within the United States, an All-American canal. [Footnote omitted.]

During the latter part of the nineteenth and the first part of the twentieth centuries, people in the Southwest continued to seek new ways to satisfy their water needs, which by that time were increasing rapidly as new settlers moved into this fast-developing region. But none of the more or less primitive diversions made from the mainstream of the Colorado conserved enough water to meet the growing needs of the basin. The natural flow of the Colorado was too erratic, the river at many places in canyons too deep, and the engineering and economic hurdles too great for small farmers, larger groups, or even States to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem; spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farmland and crops.

It is not surprising that the pressing necessity to transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States began to

be talked about and recognized as far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been. The inadequacy of a local solution was recognized in the Report of the All-American Canal Board of the United States Department of the Interior on July 22, 1919, which detailed the widespread benefits that could be expected from construction by the United States of a large reservoir on the mainstream of the Colorado and an All-American canal to the Imperial Valley. [Footnote omitted.] Some months later, May 18, 1920, Congress passed a bill offered by Congressman Kinkaid of Nebraska directing the Secretary of the Interior to make a study and report of diversions which might be made from the Colorado River for irrigation in the Imperial Valley. [Footnote omitted.] The Fall-Davis Report, [Footnote omitted.] submitted to Congress in compliance with the Kinkaid Act, began by declaring, "The control of the floods and development of the resources of the Colorado River are peculiarly national problems . . ." [Footnote omitted.] and then went on to give reasons why this was so, concluding with the statement that the job was so big that only the Federal Government could do it. [Foot note omitted.] Quite naturally, therefore, the Report recommended that the United States construct as a government project not only an all-American canal from the Colorado River to the Imperial Valley but also a dam and reservoir at or near Boulder Canyon. [Footnote omitted.][74]

In short, as this Court long ago recognized, without the huge infusion of funds provided by nearly two hundred

74. That precarious posture is also prominently noted as an urgent need in *The Hoover Dam Power and Water Contracts and Related Data* 3-4 (Department of Interior, 1933); *see also* Gates, *History of Public Land Law Development* 686 (1968) and N. Hundley, Jr., *Water and the West* 38, 39 and 170 (1975).

million Americans, the 715 farms of the Imperial Valley would have returned to desert lands. Now, the Valley is indeed prosperous. It is not too much, nor inequitable, to ask the excess landowners to share some of that prosperity for to do so was the very reason that all of those federal taxpayers provided their hard-earned taxes.

The excess landowners also claim inequity in that if they sell their excess landholdings, they will have to sell "at appraised prices far below the investment costs." L. Br. 20. But this assertion can only evoke curiosity for as part of the District's Appendix to their Petition for Certiorari is the proposed regulation of the Department of Interior of August 22, 1977, which explicitly provides for an appraisal pricing process which encompasses the value of all improvements. D. App. 239a-240a.

Finally, they rhetorically question how the authors of § 46 could intend to penalize the farmer who had spent his life making this land productive. L. Br. 20. Of course, argument presented with such succinct flourish can easily overlook the subsidy value of $1,000.00 plus per acre per year[75] which they have received for much longer than the usual ten year recordable contract period. Likewise, the landowners overlook those who have long labored but been denied the breakup covenanted under the reclamation law. Professor Taylor reminds us of James Bryce's specific criticism of California's land system where immigrant Mexicans have been employed seasonally in ever larger numbers yet denied the opportunity of landownership.[76] But even more pointed are the contemporary statistics which show how that polarization of this rural society continues unabated.

75. See Respondents' Brief, "Statement of the Case".

76. *Mexican Migration And The 160 Acre Limitation*, 63 CALIF. L.REV. 732, 738-740 (1975), citing Bryce, 2 *The American Commonwealth* 427 (7th ed. 1923).

> While in the country as a whole, the average percentage of "farm personnel" belonging to the "lower class" in 1959 was 31.1 percent, in California the percentage was 55.7, and in Arizona 71.4. In Imperial Valley, California, where reclamation law is unobserved, the "lower class" mostly of Mexican birth or parentage, reached 87.3 percent.[77]

Enforcement of the acreage limitation will create a much greater likelihood that this economic polarization of rural California will abate. Small family-sized farms can prosper. A 1977 study demonstrated that seventeen different vegetable crops could produce an income equal to the median family income in California on plots of land ranging from 7.1 acres for lettuce to 66.7 acres for spinach; fifteen of the 17 crops could produce at that income level on less than 40 acres. "The Family Farm In California: Report of the Small Farm Viability Project" (Calif. Employment Development Dept. 1977). In this light, it should be emphasized that the average irrigated farm in California has 164 acres. U.S. Dept. of Agriculture, "The U.S. Department of the Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis," Feb. 1978, p. vii. Since owners of farms this size also have an average non-farm income of over $15,000 per year, *id.*, at 23, their total income would exceed $30,000 per year.

A small, family-sized farm base would provide for more prosperous rural communities. The intent of Congress was not only to produce food on small, family-sized farms but it was also to *thereby* foster prosperity and economic de-

77. Quoting T.L. Smith, "A Study of Social Stratification in the Agricultural Sections of the U.S.," 34 *Rural Sociology* 496, 506-08 (1969). Unfortunately this research shows little or no social progress since Professor Taylor's 1928 monograph ***Mexican Labor in the United States, Imperial Valley*** (Univ. of Calif. Press [1930] and Johnson Reprint Corp. [1966], especially 29-40 and 61-71).

mocracy in rural America. In 1946, the U.S. Senate Select Committee on Small Business sponsored a study of two communities in California's San Joaquin Valley.[78] This now classic study of anthropologist Walter Goldschmidt compared the communities of Arvin, in Kern County, and Dinuba, in Tulare County. The major distinction between them was that Arvin was surrounded by large commercial farms while Dinuba was surrounded by mostly small, family farms. The agricultural production volumes of the two communities were equivalent, however. In other words the economic base was approximately the same. The major conclusion of Professor Goldschmidt was that Dinuba had a more active economic and social life than Arvin. In 1977, 30 years later, the two communities were studied again to determine what had occurred through the passage of time. See "The Family Farm In California: Report of the Small Farm Viability Project" (Calif. Employment Development Dept. 1977), at 18-30. In general, the population of Dinuba (the small farm town) had grown at a faster and steadier rate; the large farm community had become more dependant on outside sources of funds because of an eroded local tax base; Dinuba's residents had attained a higher median level of school years completed; Dinuba continued to have twice as many small businesses, four times the number of social and civic organizations, twice as many churches; Dinuba has five parks and eight playgrounds, while Arvin has two parks and no playgrounds. Another significant distinction was that 42% of Arvin's voting age population was registered, while 54% were registered in Dinuba; in Arvin, only 75% of those registered actually voted, while 91% of Dinuba's registered voters exercised that right. *Id.*

78. ***Small Business and The Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations,*** Sen. Comm. Print No. 13, 79th Cong. 2nd Sess. (1946).

IV. Petitioners' Procedural Pleas Are Without Merit

A. RESPONDENTS HAVE STANDING TO ENFORCE § 46 OF THE OMNIBUS ADJUSTMENT ACT OF 1926

The opportunity for ownership . . excess land holdings in the Imperial Valley by the Yellen group is a statutorily protected interest under §§ 12 and 14 of the Boulder Canyon Project Act of 1928.[79]

By these reclamation statutes, as well as the interrelated family-sized farm support acts discussed in Part I *supra,* Congress has pursued an involved but consistent course for the benefit of family-sized farmers.[80] They reflect the recognition that wealth (including land and water) concentration in the hands of producers is economically inefficient as well as socially inequitable.[81]

The narrowly drawn beneficiaries under the Project Act are those like respondents who stand to benefit directly from the breakup of excess lands in this project area.[82]

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79. Set out at L.App. 146a-148a.

80. The respondents are special beneficiaries of the Project Act as the proposed regulations to implement the residency requirement of the reclamation law provide that only those persons whose principal place of residence is within fifty miles of the excess lands of the Imperial Valley will be "eligible nonexcess owners." Part 426.4(l) of Title 43 C.F.R., Dist. App. 229a. This is reaffirmed in the recent Opinion of the Solicitor, M-36919—Pub. Lands Dec.—(December 6, 1979).

81. J. M. Blair, *Economic Concentration—Structure, Behavior, and Public Policy* (1972); *Role of Giant Corporation: Hearings the Subcommittee on Monopoly of the Senate Select Committee on Small Business,* 92nd Cong., 1st & 2d Sess., parts 3, 3A, and 3B (1971-72).

82. The only project area in issue is the Imperial Valley. The petitioner Imperial Irrigation District has chosen hyperbole to miscast the position of the respondents. Dist. Br. 9 and 73-75. Without the need to resort to such invective, *amici* have in Part I of this brief set out the consistent intentions of many Congresses to insure the break up of even pre-existing monopoly on private lands by denying project water to them. See Chief Judge Browning's opinion in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093, 1119-1122 (9th Cir. 1976), *cert denied* 429 U.S. 1121 (1977); *see also* Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 YALE L.J. 477, 484 (1955).

The Ninth Circuit, in its principal opinion as well as its memorandum on petition for rehearing, went to painstaking lengths to explain the clear grounds for standing by the respondents under even the most exhaustive of this Court's standing pronouncements. Thus, in addition to an examination of the Constitutional requisites of Article III, the Ninth Circuit considered the prudential constraints on standing which this Court has articulated in statutory contexts, such as those presented by the case at bar.

The respondents alleged in support of their motion for permission to intervene before the district court that they resided within the boundaries of the Imperial Irrigation District. Con. App. 323a-348a. Most of them were farmworkers who owned no farm land elsewhere and they desired to purchase some of the "excess lands" which are irrigated with water delivered by the All-American Canal. Had the government prevailed at trial before District Judge Turrentine, these "excess lands" are those whose sale § 46 of the Omnibus Adjustment Act requires. Respondents further alleged that they were within the class of beneficiaries of the reclamation laws which were the focus of the government's complaint. Con. App. 267a-274a. Thus the Ninth Circuit concluded: "Read, as it must be, in the light of the government's complaint, [the intervenor-respondents'] interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46." *U.S. v. Imperial Irrigation District,* 559 F.2d 509, 521 (9th Cir. 1977).

We first look then, as did the Ninth Circuit panel, to what is the "injury in fact, economic or otherwise."[83] Before the district court it was stipulated that there were approximately 800 excess landowners in the Imperial Irrigation District and that their aggregate excess holdings were on the order of 233,000 acres. *U.S. v. Imperial Irrigation District,* 322 F.Supp. 11, 12 (S.D. Cal. 1971). Because of the Circuit's previous decision in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093 (1976), *cert. denied* 429 U.S. 1121 (1977), the panel held that the sale of any of these excess properties in accordance with the below-market-price constraint of § 46 would put family-size farms within the economic reach of respondents. Thus their injury is not being able to purchase any of these excess lands. That injury is neither dependent upon which of the 233,000 acres was desired nor on the specific dollar amount of price reduction accomplished under the *Tulare* formula. What is certain and constitutes an injury if § 46 is not given effect is that the sales price of none of these fertile properties will be reduced.[84] As the Ninth Circuit flatly characterized the situation: "In the absence of a requirement that [excess] landowners execute a [recordable] contract [as § 46 requires, providing for below market price sales] in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices." 559 F.2d at 522.

On rehearing petitions, petitioners' thrust was to the "causation corollary" to the injury in fact requirement.[85]

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83. L. Tribe, *American Constitutional Law* § 3-17 (1978).

84. Also from Professor Richard Stewart's synthesis on standing, it is plain that respondents are highly conventional litigants and hardly exotic in their posture before this Court as intervenors. *The Reformation of American Administrative Law,* 88 HARV.L.REV. 1667, 1723-47 (1975). They have asserted in their affidavits "material interests" in the opportunity for ownership of excess acreage served by the Boulder Canyon Project water whose delivery from the Colorado River is the *sine qua non* of its rich agricultural productivity. Moreover, the character of their role is as "sole plaintiffs" and thus as Professor Stewart explains

> [O]rdinarily the legal system does not undertake to examine the adequacy of such representation any more than we seek to consider the rationality or efficacy with which an individual identifies and pursues his own interests generally. 88 HARV.L. REV. at 1742.

His elucidation of the origins of the "injury in fact" requirement is helpful for evaluating the fitness of the Yellen group as intervenor respondents.

> The ultimate ground of the "injury in fact" test, reminiscent of the common law's focus on the protection of material interests,[footnote omitted] may be in the contractarian theory of government. Put simply the theory is this: the justification for government lies in individuals' willingness to assent to a scheme of mutual cooperation that increases individuals' opportunity to satisfy their preferences. [footnote omitted] Social action, when limited to the provision and allocation of material advantages, requires no general agreement on personal preferences or values. So long as only material interests are accorded protection by law, rules can be formulated which will enable each individual to pursue his own ends through a system of reciprocity that increases wealth, leisure, and the like, thus enlarging material opportunities for all. [footnote omitted] 88 HARV. L.REV. at 1739.

The scheme for "mutual cooperation" here was that of fostering family-sized agricultural opportunities in the expansion into and settlement of the Western United States. More particularly it was that of establishing a stable irrigation source for the otherwise unproductive Imperial Valley. The "allocation of material advantage" here was balanced via the three constraints of the residency requirement, the acreage limitation, and the requirement of a recordable contract. While "social action" in such a context may "require no general agreement on personal preferences or values," herein family-sized farms as social units have been properly exalted in legislative rules as well as in American political theory. It is the "protection" of those "material interests" which the respondents have invoked and their foundation in Jeffersonian ideals argues only *a fortiori* for allowance of their standing.

85. Tribe, *supra,* § 3-21.

In its principal opinion the Ninth Circuit panel had held that redress to intervenor-respondents' claims lay in a court order declaring that § 46 of the Omnibus Adjustment Act was applicable to the Boulder Canyon Project Act and therefore the Imperial Valley. Because the Imperial Irrigation District was already present.

> [t]here would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural landholdings would be available in small parcels at prices below the current market price. 559 F.2d at 522.

Twenty months and several briefs later, the panel reaffirmed this simple but accurate logic, it recommended against rehearing in banc, and no circuit judge asked for a vote on those suggestions. 595 F.2d 525, 527-28 (1979).

A closely related argument advanced by petitioners is that the injury to the Yellen group is unlikely to be redressed if the requested relief is granted because of the excess landowners' prerogatives as sellers. The Ninth Circuit cogently replied that this Court's holding in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), was cause to doubt that the test for standing required a showing of certainty that

if they prevailed they would become landowners. The Circuit viewed respondents as in a position similar to the developer in *Arlington Heights*. Relief there would not guarantee actual construction, as financing or similar matters, unrelated to the lawsuit, might interfere. Yet this Court found that relief for the developer in *Arlington Heights* was still necessary for construction to occur and that the developer therefore had the requisite stake for standing to sue. 429 U.S. at 260-61. Similarly while there are other factors which might thwart intervenor-respondents from purchasing excess lands in the Imperial Irrigation District, "the land never will be available at below current market prices unless Section 46 is held applicable." 559 F.2d at 523.[86]

Much reliance has been placed by the petitioners on *Warth v. Seldin,* 422 U.S. 490 (1975). Their dependence upon it is misplaced. In Penfield, New York, there were no identified lands in issue upon which potential residences for persons of low and moderate income were to be built. Rather there was a constitutional challenge to the town's zoning ordinance premised upon the speculation that "but for" the extensive single-family home requirements for 98% of the town's vacant land, housing affordable to plaintiff Robert Warth and others, would be built.

The 233,000 excess acres in the Imperial Irrigation District do not lack for identifiability. Respondents are already resident in the environs and therefore already have fulfilled part 246.4(l) of Title 43 C.F.R.[87] of the Interior Secretary's

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86. The point was re-enunciated in the Circuit opinion on rehearing petitions. 595 F.2d at 528.

87. Defining an [e]ligible nonexcess owner is an individual who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of

implementing regulations.[88] Moreover, they are the beneficiaries of the statutory guarantee of acreage limitations in reclamation project areas such as the Imperial Valley.

In respondents' brief this Court's attention is more properly drawn again to the *Village of Arlington Heights* case which the Ninth Circuit also found persuasive.[89] Specifically, particular attention should be given to the party Ransom who was held to have "averred an actionable causal relationship between [the village's] zoning practices and his injury" (429 U.S. at 264) which was a "quest for housing nearer his employment." The injury and interest of respondents in the case at bar is far greater than his.

To uphold the standing of intervenor-respondents in this long litigation is finally even more appropriate because of their perseverance. One can think of few examples of more "concrete adversariness" than the nearly thirteen years since the respondents first sought participation as *amicus curiae* on August 7, 1967, before the district court. Con. App. 358a.

B. COLLATERAL ESTOPPEL DOES NOT PRECLUDE RESPONDENTS' CLAIM THAT THE ACREAGE LIMITATION APPLIES TO PRIVATE LANDS IN THE IMPERIAL IRRIGATION DISTRICT

Petitioners' defense to respondents' claims to enforce § 46 is governed by principles of collateral estoppel rather

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acquisition of the land; (2) will not, after the acquisition, be the owner of more than 160 acres of land which receives water from any Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules. Dist. App. 229a.

88. Dist. App. 217a-242a.

89. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976) is even less relevant than *Werth.* In *Simon,* profound causation questions and incomplete party participation yielded a negative holding on standing. Neither of those deficiencies is present here.

than bar or merger.[90] The distinction between bar or merger of claims and estoppel of issues previously litigated is well recognized. See, for example, *Bernhard v. Bank of America,* 19 Cal.2d 807, 810, 122 P.2d 892 (1942); *Cromwell v. County of Sac,* 94 U.S. 351, 352-353 (1877).

Respondents and their predecessors, if any, defaulted in *Hewes.*[91] Under well settled rules of pleading in California and elsewhere only the relief prayed for in the complaint could be entered against a defendant. The allegations of the *Hewes* complaint simply presented the chronology of events leading up to the All-American Canal Contract including the ratifying election. The relief prayed for was a declaration of

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90. *The Restatement of Judgments, Second* refers to collateral estoppel as "issue preclusion." See, for example, § 45 (Tent. Draft No. 1, 1973).

91. In *Hewes v. All Persons,* an *in rem* action brought by the Imperial Irrigation District in the California Superior Court for the County of Imperial, the District sought a judgment validating the contract for construction of the All-American Canal, made between the District and the United States. (The *Hewes* complaint is set forth at the end of this brief as App. A.) Service of process was by publication. Charles Malan, an owner of more than 160 acres in the District, answered as a defendant praying that the contract "be declared illegal, invalid and not obligatory upon the said Irrigation District." (The Malan answer is set forth herein as App. B.) He also filed an independent action seeking to declare the contract void and to enjoin the District from spending any funds to carry it out. (*Hewes* opinion, L. App. 105a, 106a-107a.)

Malan claimed, both in his complaint and in his answer (*Hewes* opinion, L. App. 102a and 109a), that the contract was illegal because the reclamation laws prohibited owners of more than 160 acres from receiving federally subsidized water (Malan answer, pp. 25-26, App. B). He moved to consolidate his case with that of the District, but the court sustained the District's demurrer to his complaint without leave to amend, thus never ruling on his motion (*Hewes* opinion, L. App. at 107a and 109a). The case went to trial on his answer, and the court determined that under the contract he would not be denied water from the All-American Canal though he owned more than 160 acres (*Hewes* findings of fact and conclusions of law, Dist. App. at 144a and 149a). The court entered the default of all defendants who did not answer (*Hewes* findings, Dist. App. at 121a-122a).

validity.[92] There was no reference to the 160 acre limitation of reclamation law until Malan filed his answer. The affirmative defense raised by Malan concerning the average limitation was in issue, if at all, between the District (whose directors were plaintiffs in *Hewes*) and Malan. Malan's affirmative defenses did not expand the complaint and its prayer against non-appearing and defaulting parties who were given the "all persons" designation. In California, an *in rem* judgment is only valid against non-appearing parties to the extent of the complaint on file at the time the summons issues. *Board of Directors of Modesto Irrigation District v. Tregea,* 88 Cal. 334 (1891). Under the procedure followed in *Hewes,* the judgment would not be *res judicata* against the entire world on the new matter raised by Malan. If the judgment on the application of the acreage limitation is preclusive, it would be so only under the doctrine of collateral estoppel.

Acreage limitation issues are not pertinent to issues in a contract confirmation proceeding. The California Supreme Court's decision in *Ivanhoe Irrigation District v. All Parties and Persons,* 53 Cal.2d 692, 727-28, 3 Cal.Rptr. 317 (1960), (hereafter, "*Ivanhoe* II") made it clear that issues regarding distribution and sale of water are not cognizable in

92. The District's prayer in *Hewes* asked the court to:
> [D]etermine that that certain contract . . . between the United States of America and Imperial Irrigation District . . . is and that each and every of the terms thereof are lawful and within the lawful powers of Imperial Irrigation District to make, enter into and carry out in accordance with its terms, and all proceedings leading up to and including the execution thereof have been performed in the manner required by law and that said contract is valid and legally binding upon said Imperial Irrigation District and that this Court make and cause to be entered its judgment establishing and adjudging said contract to be valid and a legal obligation of said District and for such other, further and additional relief as is meet in the premises.

contract confirmation proceedings under the Irrigation District Federal Cooperation Law.[93] The court described such a proceeding as *in rem* in nature and said:

> The duty of the trial court was to determine whether or not the contract was valid and entitled to confirmation. It was not to determine what the various parties claimed were their rights and duties under the contract. Such claims could be settled only by adjudication between the parties themselves. Thus the claims of parties, especially parties not before the court, were irrelevant. 53 Cal.2d at 727-28.

Thus, the court held that if any parties like McCracken wished to contest application of acreage limits expressly included in the contract for the Central Valley Project, they must do so in a separate proceeding.

Similarly, in the *Hewes* case issues regarding who could receive subsidized water and on how many acres were not properly part of the *in rem* confirmation proceedings. While Charles Malan made them an issue for himself by his answer and the Superior Court accepted the issue as properly within the scope of the proceedings, neither respondents nor their predecessors were his privies or were in any sense represented by him.[94] Their interests and his are, of course, contrary, since he could not receive water brought by the All-American Canal for his excess acreage if the reclamation laws limiting water delivery for any one owner applied to lands in the District. By contrast, respondents seek this very result.

93. California Water Code § 23175 *et seq.* Section 23225 of the Code is the codification of Cal. Stats. 1917, ch. 160, § 3 pursuant to which the District invoked the jurisdiction of the California Supreme Court in the *Hewes* case.

94. It is apparent from the pleadings and the findings that neither his answer nor his complaint were pleaded as a class action.

Under pleading rules in California, Malan could not broaden the scope of the District's complaint by his answer. The effect of the *in rem* judgment in *Hewes* is to bind only the property within the Imperial Irrigation District and the parties *only* as to issues actually litigated by the parties who appeared in that action. The *Restatement of Judgments, Second,* § 73 (Tent. Draft No. 1, 1973) states the general rule that an *in rem* action determines the interests of all persons in the world in the thing at issue in the action. In addition, Comment *a* to § 73 notes that no issues are precluded by an *in rem* judgment "except as between parties *appearing* and litigating particular issues. However, interests in the thing are conclusively determined even as to parties who default."[95] (Emphasis added.)

Section 73, Comment *d* makes clear that only those parties to an *in rem* proceeding *who actually appear* and litigate an issue as adversaries may be precluded from relitigating that issue. Moreover, the parties may only be precluded if determination of that issue was essential to the judgment.[96]

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95. Section 73 reads in relevant part:
A valid and final judgment in an action based only on jurisdiction to determine interests in a thing:
(a) Is conclusive as to those interests with regard to all persons, if the judgment purports to have that effect (traditionally described as "*in rem*") . . . and
. . . .
(c) Is conclusive between parties, in accordance with the rules of issue preclusion, as to any issues *actually litigated by them* and determined in the action. (Emphasis added.)

96. Comment *d* states in relevant part:
A valid judgment based only on jurisdiction over a thing is conclusive as to interests in the thing, even as to nonappearing parties (see Comment *a*). Such a judgment has no further conclusive effect except in accordance with the rules of issue preclusion set forth in §§ 68, 68.1. Under those rules, parties who have *appeared* in the action and litigated an issue as adversaries will normally be precluded from relitigating that issue if its determination was essential to the judgment. (Emphasis added.)

Thus, only the interests of respondents and their predecessors at the time of the *Hewes* litigation or now—as to contractual obligation affecting the lands within the district were conclusively determined by the *Hewes* judgment. No other issues were or could be determined by the Superior Court decree, most particularly because neither respondents nor their predecessors *appeared* in *Hewes.*

As mentioned earlier, Section 73, Comment *d* refers to the general rules of issue preclusion to determine what, if any, issues other than those interests in the *res* at issue are precluded. The *Restatement of Judgments, Second,* § 68 (Tent. Draft No. 1, 1973) states the general rule of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.

California law is in accord with the *Restatement. English v. English,* 9 Cal.2d 358, 361, 70 P.2d 625 (1937); *Price v. Sixth District Agricultural Ass'n.,* 201 Cal.502, 258 P. 387 (1927).[97]

Here, the question is whether the Superior Court judgment in *Hewes v. All Persons* precludes respondents from asserting that § 46 of the Omnibus Adjustment Act of 1926 applies to the Imperial Valley. Neither they nor their predecessors in interest have ever previously litigated that issue.

Nowhere in the *Hewes* complaint was it alleged that acreage limitation did not apply. Moreover, the District was

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97. On the prerequisite of actual litigation of an issue between the parties in order to justify preclusion, see *Developments—Res Judicata,* 65 HARV.L.REV. 818, 840-842 (1952).

actively opposed to that interpretation of the contract or of § 46 of the Omnibus Adjustment Act of 1926.[98]

98. See 559 F.2d 509, 526 ftn. 31.

Though Charles Malan put the acreage limitation in issue by his answer (and tried to consolidate with *Hewes* his independent action raising the same issues), his pleadings joined issue only as between him and the District. Respondents cannot be bound by his litigation of the issue since neither they nor their predecessors were in privity with him. *Zaragosa v. Craven,* 33 Cal.2d 315, 202 P.3d 73 (1949). Thus, they were not in any sense represented by him in the defense he asserted. Moreover, since he was an owner of more than 160 acres, he desired a ruling not applying any limits for receiving subsidized water, while respondents want the contrary. His motives for raising the issue must be considered *prima facie* suspect so far as any claim that he adequately represented their interests.

Thus, respondents and the District have not litigated the present issue.[99] On this basis alone, then, respondents are not precluded from now seeking judgment to give effect to the acreage limitation.

Exceptions to issue preclusion are appropriate here even if the Court determines that the acreage limitation issue was litigated by respondents and was essential to the *Hewes* judgment. *Amici* have shown that precluding respondents from seeking to impose acreage limitation in the Imperial Irrigation District is not appropriate because they did not litigate the issue and because determination of the issue was not essential to the *Hewes* judgment.

99. The landowners here are mere intervenors and, as such, support the District's position. Thus, for preclusion doctrine purposes, the relevant parties are the Imperial Irrigation District and respondents and their privies, if any.

Exceptions are made regarding matters of the important public policy. California, for example, recognizes an injustice exception to issue preclusion. In *Guardianship of DiCarlo,* 3 Cal.2d 225, 235, 44 P.2d 562 (1935), the California Supreme Court said: "That principle [preclusion] is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy." *Greenfield v. Mather,* 32 Cal.2d 23, 35, 194 P.2d 1 (1948), reiterates this exception. Most recently, in *Hight v. Hight,* 67 Cal.App. 3d 498, 503, 136 Cal.Rptr. 685 (1977), the exception was applied where a Colorado mother was represented by the district attorney in a reciprocal support enforcement proceeding in California but did not herself appear. Under the special circumstances of that case where she was a resident of another state and was not adequately represented by the district attorney, the court approved the trial court's exercise of discretion in refusing to preclude her subsequent action in California for support, saying that she did not have "fair opportunity to litigate" in the previous proceeding. *Id.*[100]

Thus, in the present case, even if this Court determines that all the factors for collateral estoppel were present in the *Hewes* judgment, it should still uphold the Ninth Circuit's exercise of discretion to permit respondents to litigate the acreage limitation issues on appeal. The peculiar circumstances of the *Hewes* case do not furnish a sound basis for refusing respondents a fair opportunity to now litigate the issue. There is a national policy of great impor-

100. See *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 328, 99 S.Ct. 645, 650 (1979), where the Court said: "Although neither judge, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."

tance to be upheld here, a policy repeated since the Ordinance of 1785. Respondents seek to bridge the gap from policy to reality. To preclude them from urging the courts to cross that bridge would certainly defeat the ends of justice.

As the California Supreme Court recently acknowledged, there is "sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest." *Chern v. Bank of America,* 15 Cal.3d 866, 872, 127 Cal.Rptr. 110 (1976); *Louis Stores, Inc. v. Dept of Alcoholic Beverage Control,* 57 Cal.2d 749, 757-58, 22 Cal. Rptr. 14 (1962). In *Chern,* the interest that the court allowed the plaintiff to protect even though she had previously litigated and lost the same issue against another party was the public interest evidenced by the California Legislature in its "comprehensive scheme of banking and financial regulations." 15 Cal.3d at 872. Likewise, in the present case, respondents seek to vindicate an intricate and comprehensive scheme of laws intended to specifically benefit small farmers, rather than large-scale agricultural operators, and to generally benefit rural communities.

Another exception is often made for legal issues where subsequent claims are substantially unrelated to a prior judgment or where there has been an intervening change in law. The *Restatement of Judgments, Second,* § 68.1 (Tent. Draft No. 4, 1977), states this exception as follows:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
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> . . . .
>
> (b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . .

California recognizes these exceptions. *Louis Stores, Inc., supra.*

Here, respondents are not precluded because application of acreage limitation to the Imperial Irrigation District is an issue of law, and the *Hewes* litigation and the present case are substantially unrelated claims. Whether § 46 of the Omnibus Adjustment Act of 1926 requires acreage limitation in the Imperial Valley is primarily a question of law. In order to determine the issue a court must construe provisions of that Act together with the Boulder Canyon Project Act and the Reclamation Act of 1902.

Neither are respondents precluded where the issue is one of law and the applicable legal context has changed since the *Hewes* decision. Since 1933 when *Hewes* was decided, two important administrative rulings, this Court's decision in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958) and the Court of Appeals decision in *U.S. v. Tulare Lake Canal Co.,* 535 F.2d 1093 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977) have intervened.

In 1945, Fowler Harper, Solicitor for the Department of Interior, issued a formal opinion (78 I.D. 496, 533, Appendix H) ruling that the 160 acre limitation applied to land in the Coachella Valley County Water District, which receives water from the Boulder Canyon Project just as does the Imperial Irrigation District. This opinion, then, manifests the inconsistent interpretation between Secretary Ray Lyman Wilbur's informal letter, upon which the District

and the landowners depend so heavily, and that later, more rigorous legal review in Harper's opinion.[101]

In 1958, this Court decided in *McCracken, supra*, that the acreage limits of the reclamation laws applied to lands receiving water from the Central Valley Project in California. The Court rejected claims by McCracken, an owner of more than 160 acres, that his alleged pre-existing vested water rights permitted him to receive subsidized water for his excess lands. 357 U.S. at 290-91. *McCracken,* therefore, undermined Secretary Wilbur's letter saying that those landowners in the Imperial Irrigation District could receive subsidized water on excess lands where they had perfected their right to water from the Colorado River before the Boulder Canyon Project was built.

Then, in 1964, in another formal opinion, Solicitor of the Department of Interior, Frank J. Barry, specifically rejected the Wilbur letter and determined that the 160 acre limitation did apply to lands within the Imperial Irrigation District. (71 I.D. 496). These three rulings plus the *Tulare* decision changed the legal context in which this Court must consider respondents' claims.

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101. The Solicitor's Opinion severely undercut the strength of the Wilbur letter:

> A study of the [Wilbur] letter reveals that it completely disregards all other excess-land provisions except section 5 of the Reclamation Act of 1902. This construction of the Congressional intention is not borne out by a review of the proceedings of Congress .... Furthermore, an examination of the files reveals that the letter of the former Secretary [Wilbur] was written at the request of counsel of the Imperial District who wanted a ruling on the application of the excess land provisions "provided, that such ruling would be that the 160 acre limitation did not apply." Purposely, the letter of Secretary Wilbur never took the form of a formal decision. It was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up the construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close. In less than ten days after the date of Secretary Wilbur's letter (February 24, 1933), President Roosevelt was inaugurated. 71 I.D. 496, 533, 547-548, Appendix H.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948) is the principal case supporting respondents' right to litigate application of the acreage limitation, despite *Hewes,* because of changes in the law. In *Sunnen,* this Court held that a prior determination that royalties under a license agreement were not taxable to the licensor was not conclusive in a subsequent action for a different tax year involving royalties received under a different agreement with parallel provisions, even though collateral estoppel might apply to royalties paid under the first agreement in subsequent years. 333 U.S. at 601-2.

This Court pointed out that collateral estoppel is a flexible doctrine that is capable of being applied to avoid undue disparity between similarly situated persons. *Sunnen,* 333 U.S. at 599; *United States v. Stone & Downer Co.,* 274 U.S. 225, 236-37; *Grandview Dairy v. Jones,* 157 F.2d 5 (2d Cir., 1946), *cert. den.* 329 U.S. 787. "That principle [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." 333 U.S. at 599.

In *Hewes,* the California Superior Court determined that vested rights of landowners in the Imperial Irrigation District to Colorado River water could not be taken without compensation. L. App. at 124a. As noted above, that ruling was cast in doubt by *McCracken, supra,* which rejected the vested rights claims of excess landowners receiving water from the Central Valley Project in California.

The basis for cases like *Sunnen, supra,* that refuse to preclude subsequent litigation is a desire for equal treatment of like subjects of a statutory scheme. 333 U.S. at 599. If a

court determined in the later case that a party was estopped, the party benefiting from this ruling would gain unfair commercial advantage or suffer unfair disadvantage as compared with other similarly situated persons who were not precluded by the prior litigation. In the same way here, landowners who can claim the benefit of the *Hewes* judgment, erroneous now in light of *McCracken*, gain an unfair advantage over their fellow citizens and residents of the Imperial Irrigation District whom Congress intended to benefit from the Boulder Canyon Project Act. If the Court accepts petitioners' preclusion claims, the landowners will be allowed to continue receiving federal project water forever and the egalitarian purpose envisioned by Congress will never be achieved.

Respondents' claim that they may not be precluded is also supported by *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 124 (1945). There, the intervening change of law was a decision by this Court decided while *Duel* was pending on appeal from the Wisconsin Supreme Court. This Court affirmed the Wisconsin Supreme Court's decision but held "*res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or change in the law creating an altered situation." 324 U.S. at 162.

Yet another exception applies where

> [t]here is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest . . . , or (iii) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

> *Restatement of Judgments, Second*, § 68.1(3) (Tent. Draft No. 4, 1977).[102]

Part I of this brief carefully explains the public interest in fostering small farms as expressed by Congress in numerous enactments. Agriculture in the Imperial Valley is dominated by very large landholdings.[103] All of these excess land owners irrigate with Colorado River water delivered through the All-American Canal built under the Boulder Canyon Project Act. To require them to execute recordable contracts or sell their excess lands will give an opportunity for ownership of valuable farm land for many others, including respondents. Enforcement of the acreage limitation is clearly in the public interest as consistently espoused by Congress over the years.

Another special circumstance of the present case justifying a refusal to preclude respondents' claims is the evolving notion of due process in acquiring jurisdiction *in rem* or *quasi-in-rem*. To preclude relitigation of an issue where the court rendering judgment had not obtained jurisdiction in accord with present requirements, at least as to issues not actually litigated where the party precluded lacked a fair opportunity to address those issues, would be a denial of due process. *Minichiello v. Rosenberg*, 410 F.2d 106, 112 (2d Cir. 1968).[104]

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102. *Amici* do not concede that the merits of respondents' claims have ever been litigated by the parties, thus giving rise to need for a "new determination." Only Charles Malan ever litigated the issue of acreage limits in the Imperial Irrigation District. Thus, he alone could be precluded from again addressing the merits of this case.

103. "The average irrigated farm in California has 164 acres of irrigated land." U.S. Dept. of Ag., *The U.S. Dept. of Interior's Proposed Rules for Enforcement of the Reclamation Act of 1902: An Economic Impact Analysis*, Feb. 1978, at vii. In Imperial County, the average irrigated farm has 716 acres. *Id.*, at 17.

104. See, generally, *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Rush v. Savchuk*, ... U.S. ...., 48 U.S.L.W. 4088 (1980).

This Court has distinguished finality in cases where a party has appeared, specially or generally, from cases where he has defaulted. Thus, a defendant who defaults for want of appearance may contend in a collateral proceeding that the previous court did not have sufficient jurisdiction over the *res* or that he did not receive adequate notice to adjudicate his rights in the *in rem* action. For example, in *Williams v. State of North Carolina,* 325 U.S. 226, 65 S.Ct. 1092 (1945), where in a divorce action the spouse had not appeared, Mr. Justice Frankfurter observed:

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties.

Similarly, in *City of New York v. New York N.H. & H.R. Co.,* 344 U.S. 293, 73 S.Ct. 299 (1952), the Court, though not expressly mentioning *res judicata* doctrine, permitted New York City to litigate its lien rights on railroad property subject to reorganization under the Bankruptcy Act in a prior proceeding. The court, speaking through Justice Black, held:

> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. *See,* e.g., *Standard Oil Co. v. State of New Jersey,* 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from "constructive notice" by newspaper.
>
> 344 U.S. at 296.

Should a party appear, even though only specially, to contest jurisdiction over his person[105] or the court's subject matter jurisdiction[106] that court has jurisdiction to decide its jurisdiction and its determination is not subject to later attack. And, even if a court lacks subject matter jurisdiction, if it obtains jurisdiction over the defendant, it has power to decide whether it has jurisdiction over the subject matter. *Stoll v. Gottlieb,* 305 U.S. 165 (1938). There, a creditor, secured by a guaranty unsuccessfully moved the bankruptcy court to vacate its order which had cancelled the guarantor's liability on the bond of the bankrupt debtor, claiming that the bankruptcy court had lacked subject matter jurisdiction to cancel the guaranty. So far as relevant to the present case, the Court stressed at several places in its opinion that the parties had actually contested the question of jurisdiction in the prior proceedings.

Even if this Court were convinced that the determination of the acreage limit question was essential to the *Hewes* judgment, the adverse impact of precluding respondents from litigating it now (for the first time) clearly outweighs the interest in finality at the root of collateral estoppel principles. If respondents are precluded, that ruling will vitiate congressional objectives to encourage family-sized farming in the Imperial Valley. Access there to the rich means of agricultural production will remain forever beyond the "little fellow" who lives there.

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105. *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522 (1931).

106. *Davis v. Davis,* 305 U.S. 32 (1938).

Owing to special circumstances, neither respondents nor the predecessors have ever had a full or fair opportunity to litigate the acreage limitation question. They were not notified, actually or constructively, that the acreage limitation was to become an issue in *Hewes*. Nowhere in the complaint did the District allege anything about the application of the acreage limitation. Nor did its prayer contain any request for relief in this regard.

V. Petitioners' Pleas for Fairness Are Claims That an Equitable Estoppel Lies. Estoppel, However, Cannot Be Asserted Under the Facts of This Case

Each of the petitioners makes extended arguments that to apply acreage limitation now would be unfair.[107] As the landowners say:

> The heart of this case is not a series of legal arguments . . . . It is the indisputable fact that fifty years ago the Government interpreted the Boulder Canyon Project Act to entitle Imperial Valley farms to enjoyment of their water rights free of acreage limitation. For 50 years, ordinary people in the Imperial Valley, farmers not legal scholars, relied on the Government's conduct without suspecting that one day lawyers' quibbles could overturn the premise on which their lives and livelihoods had been built up over the years. L. Br. 24.

Such an argument is one which essentially is a claim of equitable estoppel. But equitable estoppel can not ordinarily be asserted against the government.[108] *Utah Power and Light*

107. L. Br. 18-21, 24-27; D. Br. 8-10, 59-60; S. Br., 7-8.

108. While it is true that the government is not a party to this *appeal*, it was the plaintiff in the trial court; it is not a party to this appeal only because of the erroneous judgment of Solicitor General Griswold. See Respondents' Memo. In Opp. to Petitioners for Writ of Certiorari, pp. 10-11, n.3.

Moreover, the Government is before this Court as *amicus* vigorously arguing in support of respondents' claims. For these reasons, the principles by which equitable estoppel is or is not asserted against the Government ought to apply under these unusual facts.

Co. v. United States, 243 U.S. 389, 408-09 (1916); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-85 (1947); *United States v. State of California*, 332 U.S. 19, 39-40 (1947); *United States Imm. and Nat. Service v. Hibi*, 414 U.S. 5, 8 (1973). In *Utah Power and Light Co., supra*, a utility had, for over twenty years, constructed and operated "dams, reservoirs, pipe lines, power houses, transmission lines, and some subsidiary structures," 243 U.S. at 402, on federal forest lands. Neither a grant nor a license to do so had ever been sought or obtained. The utility did claim that "an understanding and agreement was had between [them and] . . . officers or agents of the United States" to allow them to operate on the land. Relying on that agreement, they invested substantial funds to develop the land and, therefore, claimed that the Government was estopped from questioning their right to remain. *Id.*, at 408. The Court said:

> [I]t is enough to say that the United States is neither bound or estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit . . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit . . . .

In *United States v. California, supra*, at issue was the title to the three-mile strip of the Pacific Ocean off the shore of California. California had granted leases to many per-

sons and corporations authorizing the taking of oil, gas and other minerals, the value of which, while not specified, must have been substantial. California asserted equitable estoppel based on the acts of agents of the United States. The claim was rejected on the basis of reasoning similar to that in *Utah Power and Light*. 332 U.S. at 39-40.

While this Court has never recognized the claim of equitable estoppel, several of the courts of appeal, most notably, the Ninth Circuit, have. *United States v. Ruby Co.*, 588 F.2d 697, 701-05 (9th Cir. 1978) contains a lengthy exposition of how the claim is treated. The court explains that:

> [a]s applied to the government, it requires a balancing test. On the one side, the court must weigh the tendency of "the government's wrongful conduct . . . to work a serious injustice . . . ." Against this consideration, the court must balance the countervailing interest of the public 'not [to] be unduly damaged by the imposition of estoppel.' [Citation omitted.] These policy factors may militate against application of estoppel even though the technical elements of the doctrine are present.
>
> *Id.*, at 703.

The facts before the court were that an 1877 fraudulent survey of lands bordering the Snake River in Idaho resulted in the omission of 14,000 to 16,000 acres of land for which the United States sought title, nearly 100 years later. The landowners asserted estoppel based upon the fact the government became aware of the error in 1922 and nevertheless refused to resurvey the property. The court refused to recognize an estoppel in light of the duty of the government to hold public lands in trust, relying on *United States v. California, supra.* The court said that "while one may be sympathetic with the landowners . . ., we must not be unmindful that the land involved belongs to all of the people of the United States." *Id.*, at 705.

Under the facts of this case, where the principal, if not exclusive, purpose of the reclamation laws was to foster family farms, and thereby enhance rural communities, the equitable estoppel balance tips decidedly in favor of furtherance of that purpose.

VI. Conclusion

The opinion of the court of appeals should be affirmed and the American value of family-sized farming preserved.[109]

Respectfully submitted,

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109. Counsel for *amici* wish to acknowledge the invaluable assistance of Professor Emeritus Paul S. Taylor. Also helpful were Elaine Yoki and Sandra Friedrich.

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San Francisco, California

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL

No. 15460 Dept. 2

In the matter of the validation of a contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, main canal and appurtenant structures, and for delivery of water" between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said district on the 12th day of January, 1933.

John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams, and Mark Rose, as and constituting the Board of Directors of Imperial Irrigation District and Imperial Irrigation District,

Plaintiffs,

vs.

All persons, including all those in anyway interested or to be interested in that certain contract, dated December 1, 1932, entitled, "Contract for Construction of Diversion Dam, main canal and appurtenant structures, and for delivery of water", between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said district on the 12th day of January, 1933, and all those having or claiming any right, title or interest in or lien or claim upon the property within said district or any part thereof, and all real property within said district,

Defendants.

COMPLAINT IN REM TO DETERMINE THE VALIDITY OF AND AUTHORITY TO ENTER INTO AND EXECUTE CONTRACT WITH UNITED STATES.

The plaintiffs in the above entitled action, for cause of action allege:

I.

That said Imperial Irrigation District is and ever since the 25th day of July, 1911, has been an irrigation district duly and regularly organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897, and the acts amendatory thereof or supplementary thereto. That said District is situated entirely within the County of Imperial, State of California, and is now and at all times since said July 25, 1911, has been acting as and exercising the rights of an irrigation district under the laws of the State of California, and that the boundaries of said District have not been changed since prior to July 1, 1931.

II.

That said John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams, and Mark Rose are and ever since prior to July 1, 1932, have been the duly elected or appointed, qualified and acting directors of said Imperial Irrigation District, and said John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose, do now constitute and at all times since prior to July 1, 1932, have constituted the Board of Directors of said District, and the whole of said board. That said John L. DuBois is now and ever since prior to July 1, 1932, has been the duly appointed, qualified and acting President of said Board of Directors of Imperial Irrigation District. That F. H. McIver is now and ever since prior to July 1, 1932, has been the duly appointed, qualified and acting Secretary of said Board of Directors. That the office of said Board of Directors is now and at all times since prior to July 1, 1932, has been located in the City of El Centro, County of Imperial, State of California, which office is now and at all times since prior to July 1, 1932, has been the usual and regular place of meeting of said Board of Directors.

III.

That prior to December 5, 1932, there was submitted to Imperial Irrigation District and to its Board of Directors, as hereinabove alleged, a proposed contract entitled "Contract for the Construction of Diversion Dam, Main Canal and appurtenant Structures and for Delivery of Water", between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River, and a main canal and appurtenant structures located entirely within the United States, connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the Reclamation law, being that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands" and the Acts Amendatory thereof and supplemental thereto, a true and correct copy of said proposed contract, as executed as hereinafter alleged, is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint.

IV.

That said proposed contract was executed on the 1st day of December, 1932, by the United States of America, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, as provided by law.

V.

That, on, towit, the 5th day of December, 1932, at a regular adjourned meeting of the Board of Directors of Imperial Irrigation District, duly and regularly held on

said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, the said Board of Directors by resolution did approve the said proposed contract as to form.

VI.

That, thereafter, on towit, the 5th day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board, duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith, to the State Engineer of the State of California for his examination and report as provided by law.

VII.

That thereafter and on the same day, towit, the 5th day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above alleged, did submit said proposal to enter into contract with the United States as embodied in the said proposed contract, together with such plans and estimates of cost as had been made in connection therewith, to the State Engineer of the State of California, for his examination and report.

VIII.

That thereafter the State Engineer of the State of California, did make an examination of said proposal as em-

bodied in said proposed contract and of the said plans and estimates of cost as had been made in connection therewith and thereafter and on the 14th day of December, 1932, did make his report as provided by law in writing thereon to the Board of Directors of Imperial Irrigation District approving said proposal as embodied in said proposed contract and the plans and estimates of costs as had been made in connection therewith, and thereafter and on the 19th day of December, 1932, filed the said report and approval with the Secretary of said Board.

IX.

That on, towit, the 5th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board, duly and regularly held on said day, at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith, to the California Districts Securities Commission for its examination and report.

X.

That thereafter and on the same day, towit, the 5th day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above alleged did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with the plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

XI.

That thereafter the California Districts Securities Commission did make an examination of said proposal as embodied in said proposed contract, and of the said plans and estimates of cost as had been made in connection therewith, and thereafter and on towit the 16th day of December, 1932, did make its report as provided by law in writing thereon to the Board of Directors of Imperial Irrigation District, approving said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and thereafter and on the 19th day of December, 1932, filed said report and approval with the Secretary of said Board.

XII.

That the plans and estimates of cost made in connection with said proposal to enter into contract with the United States and so submitted with said proposal as embodied in said proposed contract to the State Engineer of the State of California, and to the California Districts Securities Commission, as hereinabove alleged, consists of an engineering report by H. J. Gault, dated May, 1931, and transmitted May 14, 1931, to the Chief Engineer of the Bureau of Reclamation at Denver, Colorado, and that said plans and estimates of cost as contained in said engineering report were made pursuant to the terms of a cooperative contract dated March 26, 1929, between Imperial Irrigation District, Coachella Valley County Water District, and the United States of America, acting for that purpose through Elwood Mead, Commissioner, Bureau of Reclamation. That said plans and estimates of cost were approved by the Board of Directors of Imperial Irrigation District by resolution at a regular adjourned meeting of said Board duly and

regularly held on the 29th day of December, 1932, at the usual and regular meeting place of said Board, at least three members thereof being present and voting therefor.

XIII.

That, on, towit, the 19th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board duly and regularly held on said day, at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, did by resolution determine and declare that the proposed plan of works as embodied in said proposed contract and the said plans and estimates of cost made in connection therewith as hereinabove alleged was satisfactory and that the said project was feasible and that it was for the best interests of said Imperial Irrigation District and the land owners and assessment payers and water users thereof that said proposed contract be entered into and executed by Imperial Irrigation District and that it was proposed by said Board of Directors that Imperial Irrigation District enter into and execute said proposed contract upon the execution thereof being authorized by the qualified electors of Imperial Irrigation District, as provided by law.

XIV.

That, on towit, the 19th day of December, 1932, the Board of Directors of Imperial Irrigation District, at a regular adjourned meeting of said Board duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor, did by resolution order and call a special election to be held throughout Imperial Irrigation Dis-

trict on Thursday, the 12th. day of January, 1933, between the hours of six o'clock, A.M., and seven o'clock, P.M. of said day, in the manner provided by law for the purpose of submitting to the qualified electors of said Imperial Irrigation District the question whether or not said District should be authorized to enter into and execute said proposed contract and did by said resolution provide for notice of said special election as required by law and specified the form and contents of such notice, and did appoint for each precinct in said District from the electors thereof one inspector, one judge, and one clerk to constitute the Board of Election for such precinct at such special election and did in the order appointing the Board of Election designate the house or place within the precinct where said special election would be held and did order, designate and provide all matters and things necessary to the holding and conducting of said special election as required by law.

XV.

That pursuant to said resolution ordering and calling said special election notice of said special election in form and substance as specified in said resolution and as required by law, was given for the time and in the manner provided by law and the resolution and order of said Board of Directors calling said special election by the Secretary of the Board of Directors of Imperial Irrigation District, by posting said notice in three public places in each election precinct in said Imperial Irrigation District, and also in the office of said Board of Directors of said District (which notice among other things specified the polling places of each precinct) for at least twenty days prior to the date of said special election, a true and correct copy of said notice as so posted being attached hereto marked Exhibit "D" and by reference thereto made a part of this complaint, and also by publication of said notice in Imperial Valley Press, a newspaper of general circulation printed and published at El Centro in said County of Imperial, State of California, where the office of the Board of Directors of such district is kept, once a week for at least three successive weeks prior to the date of said special election, towit, on December 20, 1932, December 27, 1932, January 3, 1933, and January 10, 1933, a true and correct copy of said notice as so published is attached hereto marked Exhibit "C" and by reference thereto made a part of this complaint; such notice so posted and published specified among other things the time of holding the election and contained a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said district.

XVI.

That, on towit the 12th day of January, 1933, between the hours of six o'clock, A.M., and seven o'clock, P.M., of said day said special election was duly and regularly held throughout Imperial Irrigation District in the manner provided by law and by the said resolution and order of the Board of Directors of said Imperial Irrigation District of December 10th. 1932, ordering and calling the same, and pursuant to notice thereof given as hereinbefore alleged; that said election was fairly conducted and the returns thereof duly transmitted by the respective officers of election of the respective election precincts and delivered to the Secretary of the Board of Directors of Imperial Irrigation District.

XVII.

That the ballots used at said special election were in the form provided by law and the said resolution and order of the Board of Directors of Imperial Irrigation District of December 19, 1932, as hereinabove alleged, and contained in the proposition to be voted upon as stated thereon a brief statement of the general purpose of said proposed contract and the amount of the obligation to be assumed, towit, a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply, and acquisition of property exclusive of penalties and interest, together with a general statement of the property to be conveyed by said District, all as provided by law and the resolution and order of said Board of Directors calling and ordering said special election and as contained in the notice thereof so posted and published, as hereinabove alleged. The statement on said ballot of the proposition to be and which was voted upon as hereinabove alleged was and is as follows, towit:

"Shall Imperial Irrigation District be authorized to enter into and execute that certain proposed contract with the United States of America entitled 'Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water', executed by the Secretary of the Interior on behalf of the United States, December 1, 1932, and approved as to form by resolution of the Board of Directors of Imperial Irrigation District December 5, 1932. The general purpose of said proposed contract is for the construction of a diversion dam (referred to in said proposed contract and commonly known as Imperial Dam) in the main stream of the Colorado River and the main canal and appurtenant structures (referred to in said proposed contract and commonly known as the All-American Canal) located entirely within the

United States connecting said diversion dam with the Imperial and Coachella Valleys in California to supply water from the Colorado River and the reservoir to be created by Hoover Dam to such lands in said valleys as may be located within the boundaries of Imperial Irrigation District, and to other lands under certain conditions, and for the payment to the United States of the cost of said works as provided in the reclamation law, and in said proposed contract. The amount of the obligation to be assumed by the district for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, shall not exceed $38,500,000 together with $768,000 still unpaid under Article 9 of the contract between the United States of America and Imperial Irrigation District, dated October 23, 1918, for a connection with Laguna Dam, and the said District shall acquire, where necessary, and shall convey to the United States such lands as may be required for right-of-way purposes for said works?"

XVIII.

That on Monday the 16th. day of January, 1933, being the first Monday after said special election, and the returns from each and every precinct in the said Districts having been duly and regularly received, the Board of Directors of Imperial Irrigation District met in regular adjourned session and as provided by law at its usual and regular place of meeting in the City of El Centro, California, at least three members thereof being present, for the purpose of canvassing the returns of said special election and the returns from each and every precinct in the said District being before said board, said board did at said time and place canvass said returns in public by opening the returns and estimating the vote of the said District for and against the proposal to enter into and execute the aforesaid con-

tract and found and by resolution declared, at least three members of said board voting therefor, that at said special election there were 5676 votes cast upon said proposal of which 4947 votes were "Contract—Yes" and 729 votes were "Contract—No" and that therefore 4947 votes were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract, and 729 votes were cast against authorizing said District to enter into and execute said proposed contract. That more than two-thirds of all the votes cast for and against said proposal were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract, whereupon the Board of Directors of Imperial Irrigation District did by said resolution find and declare that Imperial Irrigation District had at said special election been authorized to enter into and execute said proposed contract.

XIX.

That thereafter on the same day and at the same place and at the same meeting of said Board of Directors last above alleged, on, towit, the 16th. day of January, 1933, the Board of Directors of Imperial Irrigation District did by resolution, at least three members of said board voting therefor, authorize and direct John L. DuBois, President of the Board of Directors of Imperial Irrigation District to sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, Secretary of said Board of Directors to attest the execution thereof and to affix thereto the seal of Imperial Irrigation District and make proper delivery of said contract to the Secretary of the Interior for the United States of America.

XX.

That thereafter and on the same day, towit, the 16th. day of January, 1933, the said John L. DuBois, as President of the Board of Directors of Imperial Irrigation District, duly signed and executed said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, as Secretary of the Board of Directors of Imperial Irrigation District thereupon attested the execution thereof and affixed thereto the seal of Imperial Irrigation District and made proper delivery of said contract to the Secretary of the Interior for the United States of America and that thereby at said time and place Imperial Irrigation District executed said proposed contract theretofore signed and executed by the United States of America acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, and dated the 1st. day of Dec. nineteen hundred thirty two, and thereupon the aforesaid proposed contract became and now is the contract of Imperial Irrigation District, a true and correct copy of said contract as so executed is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint.

XXI.

That by the acts and proceedings had and taken as hereinbefore alleged said Imperial Irrigation District was duly authorized to enter into and execute said contract, a copy of which is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint, and that each and all of the acts and proceedings for and in connection with the authorization and execution of said contract were and are valid and lawful, and all acts, conditions and things required by law to exist, happen and/or be performed

precedent to and in the authorization and execution of said contract did exist, happen and were performed in regular and due time, form and manner as required by law and said District was fully authorized and empowered to enter into and execute said contract and is fully authorized and empowered to perform and carry out the terms and conditions thereof on its part to be done, kept and performed and that said contract and each and every term thereof is within the power and authority of said Imperial Irrigation District to execute and carry out.

WHEREFORE plaintiff prays that this court after due notice and hearing determine adjudge and declare that that certain contract entitled "Contract for Construction of Diversion Dam, Main Canal and Appurtenant structures, and for delivery of water", dated December 1, 1932, between the United States of America and Imperial Irrigation District, copy of which is attached hereto marked Exhibit "A" and by reference thereto made a part of this complaint is and that each and every of the terms thereof are lawful and within the lawful powers of Imperial Irrigation District to make, enter into and carry out in accordance with its terms, and all proceedings leading up to and including the execution thereof have been performed in the manner required by law and that said contract is valid and legally binding upon said Imperial Irrigation District and that this court make and cause to be entered its judgment establishing and adjudging said contract to be valid and a legal obligation of said District and for such other, further and additional relief as is meet in the premises.

Chas. L. Childers and D. B. Roberts
Attorneys for plaintiffs.

STATE OF CALIFORNIA,
COUNTY OF IMPERIAL—SS.

John L. DuBois, being first duly sworn, deposes and says: That he is an officer of the plaintiff, Imperial Irrigation District, towit, the President of the Board of Directors thereof and also one of the plaintiffs in the above entitled action and that he makes this verification for and on behalf of said plaintiffs and all of them; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

John L. DuBois

SUBSCRIBED and sworn to before
me this 26th day of January, 1933.

(illegible)

Notary Public in and for the County of
Imperial, State of California

[Four exhibits are omitted here because of limitations of space: Exhibit "A" is the Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water, found at Dist. App. 177a; Exhibit "B" is Unenterred Public Lands and Enterred Lands for which No Final Certificate has been Issued; Exhibit "C" is Notice of Publication for Imperial Irrigation District Special Election on Question of Authorizing Execution of All-American Canal Contract; Exhibit "D" is Notice of Polling Places.]

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL

No. 15460. Dept. 2.

In the matter of the validation of a contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures, and for Delivery of Water" between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said District on the 12th day of January, 1933.

John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose, as and constituting the Board of Directors of Imperial Irrigation District, and Imperial Irrigation District,

Plaintiffs,

vs.

All persons, including those who in anyway interested or to be interested in that certain contract, dated December 1, 1932, entitled: "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures, and for Delivery of Water", between the United States of America and Imperial Irrigation District, the Execution of which was authorized at an election held in said District on the 12th day of January, 1933; and all those having or claiming to have any right, title or interest in or lien or claim upon the property within said District or any part thereof, and all real property within said District,

Defendants.

ANSWER AND OBJECTIONS OF CHARLES MALAN,

COMES NOW CHARLES MALAN,—and answers the COMPLAINT on file herein—and for answer and objections to the granting of the prayer of said COMPLAINT, says:

I

The said CHARLES MALAN alleges that he is the owner of more than one hundred and sixty (160) acres of land within the IMPERIAL IRRIGATION DISTRICT, and is an assessment payer and tax payer therein.

II

That the said CHARLES MALAN omits that the said proposed contract was signed by Ray Lyman Wilbur, Secretary of the Interior, on or about the First day of December, 1932; but DENIES that the name was signed as provided by law, or that the same was executed as provided by law, or that it ever became a contract between the said Secretary of the Interior and the said Irrigation District.

III

The said CHARLES MALAN denies that on the 18th day of December, 1932,—or at any other time, the Board of Directors of IMPERIAL IRRIGATION DISTRICT did, by resolution, order, or otherwise, call a special election to be held throughout the IMPERIAL IRRIGATION DISTRICT on Thursday, the 12th day of January, 1933, in the manner provided by law, for the purpose of submitting to the qualified electors of said IMPERIAL IRRIGATION DISTRICT, the question whether or not said District should

be authorized to enter into and execute said proposed contract; and DENIES that they did by said resolution provide for notice of said special election, as required by law; and DENIES that they did order, designate or provide all or any matters or things necessary to the holding and conducting of said special election, as required by law; but ALLEGES that said resolution and order was insufficient and illegal in the matters and particulars hereinafter pointed out and specified.

IV

That said CHARLES MALAN denies that, pursuant to the said resolution or order, and calling of said special election, or otherwise, notice of said special election, in form or substance, as required by law, was given for the time, or in the manner provided by law; but ADMITS that the notice attached to the COMPLAINT herein—and marked "EXHIBIT C",—was published at the time and in the manner alleged. CHARLES MALAN denies, however, that either the said resolution of said Board, or the said proposed notice, contained a statement of the maximum amount of money payable to the United States, or the amount of money to be payable to the United States for construction purposes, costs of water supply, or acquisition of property, exclusive of penalties, and interest, or a general statement —or any statement of the property to be conveyed by said District.

V

The said CHARLES MALAN admits that on the 12th day of January, 1933, a so-called election was held in the manner provided by the said resolution and order of the said BOARD OF DIRECTORS; but DENIES that the

same was duly or regularly held or that the same was fairly conducted, for the reason that neither the said order, resolution or notice correctly stated or gave a true and correct statement of the amount of the obligation to be assumed by the said IMPERIAL IRRIGATION DISTRICT; but ALLEGES that the amount of the obligation assumed by said District, if assumed by virtue of said contract, would amount to a much larger sum than Thirty-eight million, five hundred thousand Dollars ($38,500,000.) or the amount stated in the said order, resolution and notice; and CHARLES MALAN is informed and believes, and upon such information and belief ALLEGES: That the amount so assumed by the said IMPERIAL IRRIGATION DISTRICT, should said contract be valid, will amount to more than Ten Thousand Dollars ($10,000) in excess of the amount named in said order, resolution and notice, as a maximum amount of money to be payable to the United States.

VI

The said CHARLES MALAN denies that the ballots used at said special election were in the form provided by law, or that they contained a brief, or any, statement of the general purpose of said proposed contract, or the amount of the obligation to be assumed, or a statement of the maximum amount of money to be payable to the United States for construction purposes, costs of water supply and acquisition of property, exclusive of penalties and interest, or as provided by law; but he ADMITS that the ballots contain the language alleged in paragraph VII of the plaintiffs' COMPLAINT herein.

VII

The said CHARLES MALAN admits that the said contract was, on the 16th day of January, 1933, signed by the said JOHN L. DUBOIS, as President of said IMPERIAL IRRIGATION DISTRICT, and by the said S. H. McIVOR, as Secretary of the said BOARD OF DIRECTORS; but DENIES that the said contract was executed by the said IMPERIAL IRRIGATION DISTRICT, or by the said officers, or that any proper delivery or any delivery of the said contract was made to the Secretary of the Interior as a contract of the said Irrigation District; but ADMITS that a writing in the form of the contract set out herein, was signed by the said officers and sent to the said Secretary of the Interior; but DENIES that thereby, or at all, the said proposed contract became, or now is, the contract of IMPERIAL IRRIGATION DISTRICT.

VIII

The said CHARLES MALAN denies that by the acts or proceedings, or any of them, had or taken, as alleged in the COMPLAINT herein, or otherwise, the said IMPERIAL IRRIGATION DISTRICT was duly authorized, or authorized at all, to enter into or to execute said contract; or that each, or all, or any, of the acts or proceedings for or in connection with the alleged authorization or execution of said contract, were or are, valid or lawful; and DENIES that all or any acts, conditions or things required by law to exist happened, or to be performed, precedent to, or in the authorization or execution of said contract, did exist, or happened, or were performed, in regular or due time, form and manner, as required by law, or at all; and DENIES that said District was fully authorized or empowered or authorized or empowered at all, to enter into the execution of said contract, and DENIES that the District

is authorized or empowered to perform or carry out the terms or conditions thereof, on its part to be done, kept and performed, or any of such terms and conditions; and DENIES that said contract, or each, or any, or every of the terms thereof, or any term thereof, is within the power or authority of said IMPERIAL IRRIGATION DISTRICT to execute or carry out.

IX

That the ballots prepared by the said IRRIGATION DISTRICT Directors and used at said election, did not contain, nor did any of them contain, the amount of the obligation to be assumed by the said Irrigation District, by and through the entering into of such contract; that by the terms of the said contract, it was and is provided that the said Irrigation District agrees to repay to the United States expenditures incurred on account of any or all damages due to the existence, operation or maintenance of the diversion dam, and main canal described in said contract, the incurredness of which increases expenditures by the United States beyond said sum of Thirty-eight Million, Five Hundred Thousand Dollars, whereas the said notice of election, described in the COMPLAINT herein, and the ballots used at the said election, state the sum of Thirty-eight Million, Five Hundred Thousand Dollars as being the maximum amount of the obligation to be assumed by the said irrigation District; that if the works described and provided for in said contract are actually constructed, and used, as provided in the said contract, and if the dam described in said contract and called the "Imperial Dam" is built, as provided in said contract, the necessary result will be that the said works will damage the lands of sundry and numerous persons for many miles above the said proposed dam,

and will cause thousands of acres of land belonging to other persons to be flooded and water logged and damaged; said CHARLES MALAN is informed and believes, and upon such information and belief alleges that such damage will be more than Ten Million Dollars, such damage extending over and upon a great part of the lands embraced in the Palo Verde Irrigation District and that such damages will necessarily be incurred by the United States of America in the construction and maintenance of such dam and upon its payment by the United States of America, they will attach the obligation of the said IMPERIAL IRRIGATION DISTRICT to repay the same to the United States of America.

The said CHARLES MALAN further says that he is informed and believes and upon such information and belief alleges: That the language of the said contract providing for the repayment to the United States of expenditures incurred on account of any and all damages due to the expense, operation or maintenance of the said diversion dam, was inserted in said contract for the express purpose of including the damage which it was known would occur and result to the lands in the Palo Verde Irrigation District, aforesaid, by reason of the erection and maintenance of said dam; and that mention of such liability for damage was purposely omitted from the said notice of election and from the ballots at said election, for the purpose of deceiving the voters of the said IMPERIAL IRRIGATION DISTRICT, and causing them erroneously to believe that the total amount of obligation assumed to the United States by said contract was the sum of Thirty-eight Million, Five Hundred Thousand Dollars.

That said CHARLES MALAN further says that the said contract is illegal and beyond the power of the said Irrigation District to make, particularly in the following respects:

That by the terms of the said contract, the said Irrigation District Board attempts to abridge and limit its own legislative power given it by the Legislature of the State of California, to hereafter decide, as the occasion arises, whether it will admit other lands to the said District—and upon what terms; and further denies the power to the voters of said District to pass upon the inclusion of lands hereafter at the time when it is proposed by the owners of said lands, or a petition is filed by the owners of lands, to have the same included in said District.

That said CHARLES MALAN further says that the said contract is beyond the power of the said Irrigation District to make, for the reason that it binds the said Irrigation District to pay for the construction of the canal for the irrigation of lands which are now outside the said District and may never be a part of said District.

That the making of the said canal of the capacity of ten thousand cubic feet of water per second from Pilot Knob to Engineers Station No. 1907, is a capacity more than double the amount of any water which can possibly be used by the said IMPERIAL IRRIGATION DISTRICT, and is intended solely and entirely for the purpose of conveying waters to lands outside of said IMPERIAL IRRIGATION DISTRICT—and which may never be a part of the said IMPERIAL IRRIGATION DISTRICT.

That said contract is further illegal and beyond the power of the said Irrigation District in that it provides that a person outside the State of California shall have the right, for all time, to determine what land may be admitted to said Irrigation District, and what land may be excluded from said District, thereby attempting to cede away the legislative power granted to the Board of Directors of said

IMPERIAL IRRIGATION DISTRICT and the voters thereof, by the laws of the State of California; and also attempting to take from the Legislature of the State of California the right to provide what lands may be admitted into said Irrigation District and what lands may be excluded therefrom.

The said contract is further illegal and beyond the power of said District, for the reason that it provides, contrary to the laws of the State of California, for the payment of a part of the indebtedness of said Irrigation District upon a basis of area, instead of upon the basis of value, as is provided by the laws of the State of California.

That said contract is further illegal and beyond the power of the said Board of Directors of said Irrigation District to make in that it provides in part for the repayment of said obligation by tolls fixed by the Secretary of the Interior, and not by said Irrigation District directly, instead of in the method provided by the laws of the State of California;

That the said contract is further illegal and beyond the power of the Secretary of the Interior of the United States to enter into, for the reason that the laws of the United States require that all such contracts shall conform to the Reclamation Laws of the United States of America; and that said contract is contray [sic] to such reclamation Act in that it does not provide for the repayment to the United States of all the moneys expended by the United States, as is provided by the laws of the United States of America; and that it is especially provided by the Act under which it is attempted by the Secretary of the Interior to enter into said contract, that the Secretary of the Interior may only enter into such contract in accordance with the Reclamation Law.

That said contract is further illegal and beyond the power of even the Secretary of the Interior or the said District to enter into and make, for the reason that it is provided by the Reclamation Laws of the United States of America that the Secretary of the Interior shall not make any contract and that no water shall be furnished by the Secretary of the Interior to any canal built under the Reclamation Act, which water shall go to the owner of any tract of land larger than one hundred and sixty acres. That the said CHARLES MALAN is the owner of a tract of land in the said IMPERIAL IRRIGATION DISTRICT containing more than one hundred and sixty acres, and that by the terms of said contract the IMPERIAL IRRIGATION DISTRICT will rely upon, for its sole water supply, the terms of the said contract and will have no further source or supply of water, except water coming through the said canal provided in the said contract to be constructed.

That the lands of the said CHARLES MALAN are all under irrigation and have been supplied with water for more than twenty years and are valuable for farming purposes with irrigation, and would be without any value, whatever, if water cannot be obtained with which to irrigate the same.

X

That if the said contract is executed, or becomes effective, the said CHARLES MALAN will not be able to obtain water for his land, and one hundred and sixty acres thereof will become valueless; that said Irrigation District now has a valuable water right, and under its water right lands have been furnished with water in said District, and with an abundant supply thereof for more than twenty years;

that the execution of any such contract as that provided for, will cast a cloud upon the water right of the said CHARLES MALAN'S land, and if the Reclamation Law is obeyed by the said Irrigation District, the said CHARLES MALAN'S land will be deprived of water for irrigation purposes, and the said CHARLES MALAN will suffer irreparable damage.

XI

The said CHARLES MALAN further DENIES that any plans or specifications have ever been made in which are set forth the extent, size, nature, types of construction, locations, alignments or grades of the works to be constructed under the said contract; and ALLEGES that said contract is void for uncertainty and by reason of the fact that it is impossible to ascertain therefrom what is to be constructed, or what the size, extent, type of construction, or length of the same, is to be.

XII

CHARLES MALAN FURTHER DENIES each and every allegation in paragraph numbered Twenty-one of said COMPLAINT.

XIII

That the said pretended contract does not contain any statement of the estimated cost of construction of said canal and appurtenant work, nor refer to any estimate of such cost made by the Secretary of the Interior, and is in violation of the Reclamation Law of the United States and Acts amendatory thereto.

XIV

That it is provided in said contract that the cost of said canal and works to be paid for by the said IMPERIAL IRRIGATION DISTRICT shall not exceed the sum of Thirty-eight Million, Five Hundred Thousand Dollars, and that such provision and limitation is contrary to the laws of the United States, and is in excess of the powers and authority of the Secretary of the Interior and that the Secretary of the Interior, under the laws of the United States, has no right or authority to enter into any such contract or any contract, containing such limitation, or any limitation; and that such limitation particularly violates the Reclamation Law of the United States and Acts Amendatory thereto, and violates the provisions of Section 4-b of the Boulder Canyon River Project Act.

XV

That the said contract is further illegal, in this: That it provides that the said Canal therein provided from the Imperial Dam to Syphon Drop, a distance of about twenty (20) miles, shall contain capacity for two thousand cubic feet of water per second, and that to the extent of such capacity the said Canal shall be used solely for the use and benefit of Yuma Project of the United States Bureau of Reclamation and without cost to the lands to be irrigated thereby; and that said enlarged capacity will cost more than one hundred thousand dollars, and will constitute a gratis payment made by the said IMPERIAL IRRIGATION DISTRICT for the benefit of lands in the State of Arizona, and that there is no provision of law permitting or authorizing the said IMPERIAL IRRIGATION DISTRICT to contract any such indebtedness.

XVI

THAT THE SAID CONTRACT IS FURTHER ILLEGAL, in this: That it provides that claims of the United States, arising out of said contract, shall have priority over all other claims, thereby making such claim of the United States superior to the taxes for county, city and school purposes in the said Irrigation District and superior to the lien for taxes levied to pay the principal and interest upon bonds already issued by said IMPERIAL IRRIGATION DISTRICT, amounting to more than Fourteen Million Dollars. That no such claim or lien is allowed or permitted by the laws of the State of California, and contravenes Section 16 of Article I of the Constitution of the State of California, and also the provisions of Section VI of Article 13 of the Constitution of the State of California.

WHEREFORE, the said CHARLES MALAN PRAYS: That a judgment be entered herein that the said contract and each every provision thereof be declared illegal, invalid and not obligatory upon the said Irrigation District.

M. W. CONKLING
Attorney for Charles Malan

STATE OF CALIFORNIA }
County of San Diego } ss

M. W. CONKLING being first duly sworn, deposes and says:

That he is the attorney for CHARLES MALAN in the within-entitled matter; that he has read the foregoing ANSWER AND OBJECTIONS, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief and that as to those matters he believed it to be true; That he makes this verification for the reason that the said CHARLES MALAN resides out, and is out, of the County where affiant is and has his office; and that affiant is familiar with all the facts.

M. W. CONKLING

SUBSCRIBED and sworn to before me
this 28th day of February, 1933.

[SEAL]

LUCY A. AUST
NOTARY PUBLIC in and for the County of
San Diego, State of California.

[Exhibits are omitted because of limitations of space.]

see

7 9

4 2 5

4 3 5

IMPERIAL IRRIGATION DISTRICT

IMPERIAL COUNTY CALIFORNIA

IRRIGATION SYSTEM

IMPERIAL UNIT

JANUARY 1970

R.F. CARTER
GENERAL MANAGER

LEGEND

- CANALS & LATERALS
- PUMP CANALS
- CONTROL STRUCTURES
- SIPHONS & CHECKS
- BRIDGES
- HIGHWAYS
- RAILROADS
- CONC. LINED LATERALS
- RIVERS
- IMPERIAL UNIT BOUNDARY
- TOWNSHIP & RANGE LINES
- SECTION LINES
- ¼ SECTION LINES
- TRACT LINES
- LOT LINES
- SECTION NUMBERS
- TRACT NUMBERS
- LOT NUMBERS

Exhibit DJ

SALTON SEA

WATER SURFACE ELEV. -232.10 DEC. 1, 1969

BROCKMAN
BROWN
BRYANT
ELMORE
GUTIERREZ
KUBLER
NILSON
SHANK
SINGH

R. 11 E. R. 12 E. R. 13 E. R. 14 E. R. 15 E. R. 16 E.

T. 9 S. T. 10 S. T. 11 S. T. 12 S. T. 13 S. T. 14 S. T. 15 S. T. 16 S. T. 16½ S. T. 17 S.

RIVERSIDE COUNTY
IMPERIAL COUNTY

BERTRAM POPE FRINK WESTER HOLTVILLE FLOWING WELLS VENTURA CARGILLIA BRAWLEY EL CENTRO HEBER PLASTER CITY CALEXICO MEXICALI

M E X I C O

Dwg. No. 8223